

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

74-1900

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-1900

B

THOMAS DWEN, as President of the Suffolk County
Patrolmen's Benevolent Association and THOMAS
DWEN, Individually,

Plaintiff-Appellee,

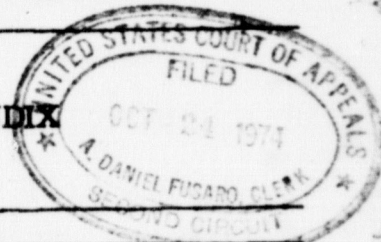
-against-

JOHN L. BARRY, Commissioner of the SUFFOLK
COUNTY POLICE DEPARTMENT,

Defendant-Appellant.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

APPELLANT'S APPENDIX



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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THOMAS DWEN, as President of the
Suffolk County Patrolmen's Benevolent
Association and THOMAS DWEN,
individually,

Plaintiff,

- against -

JOHN L. BARRY, Commissioner of
The Suffolk County Police Department,
Defendant.

Case No. 71 C 1020

NOTICE OF APPEAL

NOTICE is hereby given that JOHN L. BARRY, Commissioner of
the Suffolk County Police Department, defendant above-named, hereby
appeals to the United States Court of Appeals for the Second Circuit from
the judgment of the HON. JACOB B. MISHLER dated June 11, 1974 adjudging
that Section 2/2.16 of the Rules and Procedures of the Suffolk County Police
Department is unconstitutional and void and that the Suffolk County Police
Commissioner, his agents, servants, employees and all persons acting in
active concert with him are hereby permanently enjoined from enforcing
Section 2/2.16 of the Rules and Procedures of the Suffolk County Police
Department.

Dated: Northport, New York
June 18, 1974

S/ Patrick A. Sweeney
PATRICK A. SWEENEY
Of Counsel to GEORGE W.
PERCY, JR.
Attorney for Defendant
691 Fort Salonga Road
Northport, New York 11768
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
THOMAS DWEN, as President of the
Suffolk County Patrolmen's Benevolent
Association and THOMAS DWEN, individ-
ually,

Plaintiff,

- against -

JOHN L. BARRY, Commissioner of the
Suffolk County Police Department,

Defendant.
-----X

JUDGMENT

Index No. 71-C-1020

Permanent Injunction

This action having come on to be heard before the Court, the
Honorable Jacob B. Mishler, District Judge, presiding, and the issues
having been duly heard on the 3rd day of April, 1974, and the Honorable
Jacob B. Mishler having rendered his decision in writing on the 30th day
of May, 1974, setting forth Findings of Fact and Conclusions of Law, it
is, therefore,

ORDERED, ADJUDGED AND DECREED, that Section 2/2.16 of
the Rules and Procedures of the Suffolk County Police Department is
unconstitutional and void, and it is further,

ORDERED, ADJUDGED AND DECREED, that the Suffolk County
Police Commissioner, his agents, servants, employees and all persons
acting in active concert with him are hereby permanently enjoined from

JUDGMENT

enforcing Section 2/2.16 of the Rules and Procedures of the Suffolk County
Police Department.

Dated and entered at Brooklyn, New York, this 11th day of June, 1974.

s/ Jacob Mishler
U. S. D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THOMAS DWEN, as President of the
Suffolk County Patrolmen's
Benevolent Association and
THOMAS DWEN, individually,

71 C 1020

Plaintiff,

- against -

Memorandum of Decision
and Order

JOHN L. BARRY, Commissioner of
the Suffolk County Police
Department,

Defendant.

May 30, 1974

In November, 1971, this court denied a preliminary injunction and dismissed a civil rights action brought by the plaintiff. The United States Court of Appeals for the Second Circuit, by order dated August 22, 1973, reversed this court's dismissal of the complaint and remanded the case for trial on the issue of whether the state had " . . . some legitimate state interest reasonably requiring the restriction on the individual." 483 F.2d 1126, 1130 (2d Cir. 1973). The appellate court held that the defendant had " . . . the burden of establishing a genuine public need for the regulation." 483 F.2d at 1131.

The regulations concerning grooming standards (originally numbered 2/75.0 to 2/75.5 of the rules and regulations of the Police Department,

MEMORANDUM OF DECISION AND ORDER

County of Suffolk, New York, dated July 19, 1971, effective August 1, 1971) have been modified and renumbered. ^{/1} The complaint was amended to challenge the grooming standards set forth in Rule 2/2.16 as modified and in effect since November 15, 1973.

/1 The regulations concerning hair, sideburns and mustaches are now numbered 2/2.16 subdivisions A, B and C. The regulations concerning beards, goatees and wigs are now subdivisions D and E of 2/2.16. As modified the grooming standards effective November 15, 1973 read as follows:

2/2.16 Members of the Force will be neat and clean at all times while on duty. Male personnel will comply with the following grooming standards unless excluded by the Police Commissioner due to special assignments:

A. Hair will be neat, clean, trimmed and present a groomed appearance. Hair will not go below the ears or the collar except the closely cut hair on the back of the neck. Pony tails are prohibited. In no case will the bulk or length of the hair interfere with the proper wear of any authorized headgear.

B. If a member chooses to wear sideburns, they will be neatly trimmed. Sideburns will not extend below the lowest part of the ear. Sideburns shall not be flared beyond 2" in width and will end with a clean-shaven horizontal line. Sideburns shall not connect with the mustache.

C. A neatly trimmed mustache may be worn.

MEMORANDUM OF DECISION AND ORDER

Defendant suggested that the grooming regulations serve the dual purpose of safety and morale. Defendant's sole witness was Deputy Commissioner Robert C. Rapp. Commissioner Rapp has been the Deputy Police Commissioner since July 21, 1973 and prior to that served as both a patrolman and a sergeant on the New York City police force and as an assistant district attorney of Suffolk County.

Commissioner Rapp testified that long hair presents a safety problem to an officer attempting to make an arrest by placing that officer in a position of being thrown off balance by an offender. The Commissioner demonstrated that a downward force applied to the head through the grasp of "superfluous" hair and transmitted to the forearm in contact with the police officer's back could result in an embarrassing and potentially dangerous upending. The demonstration, favored by a bountiful head of hair supplied by the official court reporter on duty, served to illustrate that pony tails present a hazard to law enforcement officers and are a proper subject for regulation. The remainder of 2/2.16A, however, bears no relationship to safety but rather related to hair styling.^{/2} The potential danger in hairdress is the ability of the offender to grip the hair and hold the fate of the police officer in his

^{/2} The purpose of Section 2/2.16A is stated in the first sentence:

"Hair will be neat, clean, trimmed, and present a groomed appearance." The remainder of the subdivision relates to specific standards of good grooming.

MEMORANDUM OF DECISION AND ORDER

hand. Buld and length of the hair is not regulated except as it interferes with 'the proper wear of any authorized headgear.' Thus the regulation would permit bulky and lengthy hair on the top of the head, thereby presenting the very problem that was demonstrated. In the remaining subdivisions, sideburns, mustaches and wigs are regulated and beards are barred. No proof was offered to support any claim of the need for the protection of the police officer in the pertinent regulations.

The high morale of police personnel is a matter of grave concern to the department. Proper grooming is an ingredient of the esprit de corps of a good law enforcement organization. The self-esteem generated in the individual and the respect commanded from the public it serves promotes the efficiency of the organization's work. However, with the exception of the general requirement that hair, sideburns and mustaches be neatly trimmed, the regulations do not provide standards for proper grooming. Rather, the standards do nothing more than demand uniformity. Uniformity for uniformity's sake does not establish a public need. ^{/3} Defendant offered no proof that beards, goatees, hair styles that extend below the ears or collar, or sideburns that extend below the lowest part of the ear or beyond 2" in

^{/3} Commissioner Rapp testified that uniformity was required for identification. It would appear, however, that the uniform (issued by the department) supplies the necessary identification for police work.

MEMORANDUM OF DECISION AND ORDER

width and do not end with a clean-shaven horizontal line affect the morale of the members of the police department or earn the disrespect of the public.

Defendant failed to establish a legitimate state interest requiring these restrictions on the members of the police department. Rule 2/2.16 including its subdivisions is an arbitrary limitation and a purposeless restraint. As such, it is violative of the Due Process Clause of the Fourteenth Amendment and therefore unconstitutional.^{/4}

Judgment is granted in favor of the plaintiff and against the defendant declaring Section 2/2.16 of the rules and procedures of the Suffolk County Police Department unconstitutional, void and of no effect and permanently enjoining the defendant from enforcing Section 2/2.16.

Settle judgment in accordance with this memorandum of opinion on two days service (five days by regular mail).

s/ Jacob Mishler
U. S. D. J.

^{/4} Section 2/2.16 fixes grooming standards for male members only. The court does not reach the equal protection claim of the Fourteenth Amendment.

MINUTES OF HEARING

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THOMAS DWEN, et al.,

-against-

JOHN L. BARRY, Commissioner of : 71-C-1020
the Suffolk County Police
Department,

Defendant.

United States Courthouse
Brooklyn, New York

April 3, 1974
10:15 o'clock a.m.

B e f o r e :

HONORABLE JACOB B. MISHLER, U.S.D.J.

Sheldon Silverman
Official Court Reporter

MINUTES OF HEARING

1A

Appearances:

MEYER & WEXLER, ESQS.,
Attorneys for plaintiff,
28 Manor Road,
Smithtown, New York

BY: LEONARD WEXLER, ESQ.

PATRICK A. SWEENEY, ESQ.,
Attorney for defendant,
691 Fort Salonga Road,
Northport, New York 11768

-000-

MINUTES OF HEARING

2

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2
3 THE CLERK: Civil cause for trial, Dwen against
4 Barry.

5 MR. WEXLER: Both sides ready.

6 MR. SWEENEY: Both sides ready.

7 THE COURT: Who appears for the plaintiff?

8 MR. WEXLER: I do, your Honor, Leonard Wexler.

9 THE COURT: You are Mr. Sweeney?

10 MR. SWEENEY: Yes, your Honor.

11 THE COURT: Would you like to make a brief
12 statement outlining the position of the plaintiff
13 here?

14 MR. WEXLER: Yes, your Honor. The plaintiff
15 brought its action in 1971, concerning the hair
16 regulation of the then commissioner dated July,
17 1971, placing certain regulations on hair. The
18 regulations are part of the pleadings, basically
19 say the hair shall be neat and trim, may not touch
20 the collar, the sideburns, may not extend past the
21 exterior opening. Mustaches must be trim, shall
22 not extend over the top of the upper lip or beyond
23 the corners of the mouth; that there are no beards
24 or goatees and hair wigs will not be worn on duty.

25 Basically, it's our contention it's a violation
of their constitutional right. The rules and

MINUTES OF HEARING

3

1
2 regulations are unreasonable and under the Court of
3 Appeals' decision, the burden is upon the police
4 commissioner to prove the necessity of the said
5 rules.

6 THE COURT: Would you like to proceed then?

7 MR. SWEENEY: Yes, your Honor.

8 THE COURT: Do you have any statement to make?

9 MR. SWEENEY: I'll make a brief statement, your
10 Honor.

11 The sum and substance of the plaintiff's
12 complaint has been that the hair regulation existing
13 in the Suffolk County Police Department was unreason-
14 able in that it doesn't conform to community
15 standards. I intend to show at this time that there
16 has been a modification of that hair regulation which
17 is part of the pleadings making it probably more
18 incline with community standards and is somewhat a
19 different regulation than is before your Honor.

20 THE COURT: Is that the test, community
21 standards?

22 MR. SWEENEY: That is what the plaintiff
23 contends. That is not my contention at this time.
24 My contention is that the police commissioner, part
25 of the general powers and maintaining discipline and
in having a uniform regulation among police officers

MINUTES OF HEARING

4

1
2 has the power to, just as he has the power to regu-
3 late the fact that policemen may have to wear uniform,
4 wear a badge, the collar, soxs that a policeman has
5 to wear, so too, he can regulate hair lengths.
6 There's a two-prong issue, I suppose. Number one,
7 can the police commissioner regulate hair at all?
8 Number two, if he can, is this particular regulation
9 arbitrary?

10 THE COURT: The regulation that I originally
11 passed upon has been modified. Does that moot the
12 whole question or do you want to amend the pleadings
13 somehow?

14 MR. SWEENEY: That's up to the plaintiff at
15 this time. I was here on the basis of the Circuit
16 Court of Appeals saying that the commissioner had
17 the burden of showing a public need for the regula-
18 tion. I think I can do so, but, perhaps, I ask
19 counsel if he would stipulate to the new regulation
20 in effect?

21 THE COURT: Suppose you mark the new regulation
22 and I'll assume the pleadings are amended to place
23 in issue the question as to whether there is a public
24 need for the regulation and I assume the need is
25 related to the need for discipline.

MINUTES OF HEARING

5

1
2 I don't know whether we're talking about a
3 rational basis or a compelling state interest. I
4 don't know whether that's the same thing as public
5 need. I'm refreshing my recollection in reading
6 the opinion again for the first time since August,
7 1973.

8 They talk about a rational continuum, which
9 broadly speaking includes a freedom from all
10 substantial arbitrary impositions and purposeless
11 restraints. In other words, you must show that
12 there is a reason and I say I don't know whether that
13 means a rational basis or compelling state interest
14 as the phrases generally used for many tests to
15 determine the constitutionality of restraints.

16 MR. SWEENEY: Your Honor, just commenting on
17 the Circuit Court's opinion, while they do say a lot
18 of language, they make one statement at the end of
19 the opinion saying, "We imply no view on the merits."
20 By implication they certainly have said something
21 on the merits, but I indicate to the Court at this
22 time that if we can show that there is a purpose
23 for the regulation, that it's not arbitrary, then --
24 I believe the Circuit Court sent it back because it
25 was poorly decided on afterwards rather than some

MINUTES OF HEARING

6

1
2 kind of testimony.

3 THE COURT: That's the implication, but
4 want to know first what the regulation is and what you
5 conceive your burden is. It says here "To establish
6 a genuine public need for the regulation." I assume
7 that the "genuine public need" relates to the need for
8 discipline. I can think of no other public need in
9 the frame work of the issue of this case.

10 Do you agree, Mr. Wexler? Isn't it all
11 related to discipline?

12 MR. WEXLER: I don't know. It could be other
13 interests involved. I tried the Long Island Railroad
14 case of hair and there the Long Island Railroad tried
15 to use a safety and health as a state interest. Of
16 course, they failed in that. I don't know what they
17 intend to use as the basis for the interest, whether
18 it's discipline, health, safety, I don't know.

19 THE COURT: How long do you think it will take
20 to try this case?

21 MR. SWEENEY: I have one interest.

22 THE COURT: That sounds interesting. I just
23 happen to have today. I'm sandwiched in between
24 two jury trials. I'm picking a jury tomorrow. Let's
25 try to finish this today.

MINUTES OF HEARING

7

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3 MR. WEXLER: We have a problem with respect
4 to the new regulation that was promulgated on
5 November 26, 1973. I don't know whether it's a new
6 regulation in view of the last paragraph. That's
7 the reason I didn't consent to it as a regulation.

8 THE COURT: Do you agree that if the old
9 regulation is no longer in effect, that this case,
10 for all purposes mooted. We have no case. I'm not
11 going to determine whether there's a public need
12 for the old regulation if it's not in effect. It's
13 just a fruitless exercise. I've got better use
14 for my time.

15 MR. WEXLER: Yes, your Honor.

16 THE COURT: I must assume what we're talking
17 about is the regulation that is presently in effect.

18 MR. SWEENEY: The regulation in effect, the
19 deputy commissioner will testify that this is the
20 regulation to modify the other.

21 THE COURT: I want Mr. Wexler to say, "We are
22 challenging the regulation in effect." And the
23 pleadings are so amended.

24 MR. WEXLER: Yes, your Honor.

25 THE COURT: So that we have no regulation, no
objection about it. Let's mark the new regulation

MINUTES OF HEARING

8

in evidence.

THE CLERK: Defendant's Exhibit A for
identification received in evidence.

(So marked.)

THE COURT: Do you want time to go over it?

MR. WEXLER: This is the first time I've seen
it.

THE COURT: I assume you have a thousand copies
and you can loan one to Mr. Wexler. We have Xerox
copies, marked Defendant's Exhibit A. I have one
copy. I return the original copy to the defendant
and I have two copies for the plaintiff.

Now, we're all set to go. Please call your
first witness.

MR. SWEENEY: I would like to call Deputy
Commissioner Robert Rapp.

ROBERT C. RAPP, called as a witness,
having been first duly sworn by the Clerk of the
Court, testified as follows:

THE CLERK: Full name for the record, please?

THE WITNESS: Robert C. Rapp.

DIRECT EXAMINATION

BY MR. SWEENEY:

Q Commissioner, by whom are you employed?

MINUTES OF HEARING

Rapp - direct

9

1
2 A Suffolk County Police Department.

3 Q What capacity are you so employed?

4 A Deputy commissioner.

5 Q How long have you been deputy commissioner of
6 the Suffolk County Police?

7 A Appointed to that position, July 2nd, 1973. Approxi-
8 mately nine months ago.

9 Q What was your occupation prior to being
10 employed as deputy commissioner?

11 A I was an assistant district attorney in and for the
12 County of Suffolk for a period of six years.

13 Q Prior to that appointment, what was your
14 employment?

15 A Nine years I was employed by the New York Safety
16 Police Department.

17 Q In what capacity?

18 A Patrolman and sergeant.

19 Q In your duties as deputy commissioner, are
20 you familiar with the rules and regulations of the Suffolk
21 County Police Department?

22 A Yes, I am.

23 Q If I show you a copy of them, can you identify
24 them for me?

25 (Handing to witness.)

MR. WEXLER: I'll concede them, your Honor.

MINUTES OF HEARING

Rapp - direct

10

THE COURT: Let them be marked.

THE CLERK: Defendant's Exhibit B for
identification received in evidence.

(So marked.)

THE COURT: Are these originals?

MR. SWEENEY: Certified copy.

THE COURT: There'll be deemed marked if you
prefer.

MR. SWEENEY: This is my copy. They have
many originals.

THE COURT: The specific pages referred to
will be marked with a number B1, B2 and so forth.

Q Commissioner, I refer you to page 16. Could
you tell me if that's the grooming regulation that was in
effect prior to November of 1973?

A Yes, it was. Section 2.16, Sub-Divisions A-3-E, the
grooming regulation.

Q Does that in sum and substance involve the
regulation of the length of hair of patrolmen?

A Yes, it is.

MR. SWEENEY: Did you wish to mark the page,
your Honor?

THE COURT: Mark the page referred to.

THE CLERK: Page 16 so marked.

(So marked.)

MINUTES OF HEARING

Rapp - direct

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Q Mr. Rapp, I show you Defendant's Exhibit A (Handing to witness). Is that a modification of the grooming standard as exists in this book?

A Yes, it is, sir.

Q Would you previously describe to the Court what the modification is?

A Section S. Chapter 2, Paragraph 2.16, Rules and Procedures of the Suffolk County Police Department, Sub-Divisions A, B and C were amended. Sub-Section A was amended to permit hair to extend down and touch the collar at the back of the neck. This amendment was made in an effort to recognize the fact that men's hair styles have changed in the past few years. Sub-Section A also prohibits ponytails and it also prohibits length of hair that will interfere with the proper wearing of helmets or authorized uniform head gear.

THE COURT: In amending the regulations, was an opportunity offered to the members of the police department or other sections of the public to challenge the regulations or offer proof that they weren't needed or required or that they were not consistent or in line with the local community styles?

THE WITNESS: These regulations, the amendments

MINUTES OF HEARING

Rapp - direct

12

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2 thereto, Sub-Sections A, B and C were arrived at
3 after a series of meetings between myself and
4 President Johnson, Edward Johnson of the Suffolk
5 County PBA. He and I discussed the matter at some
6 length and basically, the amendments that the Court
7 has in Defendant's Exhibit A is a result of an
8 agreement entered into between he and I which
9 presumably would meet with the approval of the
10 membership as well as give the Suffolk County
11 Police Department some means to control the
12 appearance of Suffolk County police officers.

13 THE COURT: Who is Dwen F. Johnson, the
14 president?

15 THE WITNESS: The original plaintiff was the
16 president of the PBA at the time the suit was
17 instituted. He was in the reelection. Patrolman
18 Johnson was. I dealt with him as the present
19 president of the Suffolk County PBA.

20 THE COURT: So there wasn't any public hearing
21 or hearing that gave anyone else the opportunity;
22 this was arrived at in confidence as between you
23 and the present president?

24 THE COURT: Largely as a result of the decision
25 of the Second Circuit which sent it back for this

MINUTES OF HEARING

Rapp - direct

13

1
2 hearing or evidensary hearing, was the feeling of
3 Commissioner Kelly we should sit down with the PBA
4 and see what exactly they wanted or what were
5 looking for in connection with this suit. As I say,
6 Paragraphs A, B and C are the result of those
7 conferences I had with Mr. Johnson.

8 Q Mr. Rapp, I show you a drawing (Handing to
9 witness). Would you --

10 THE COURT: Do you represent the PBA at this
11 point in the proceeding?

12 MR. WEXLER: Yes, your Honor. I was waiting
13 for cross-examination before I would say anything.

14 THE COURT: Proceed.

15 Q Is that particular drawing a regulation of
16 the Suffolk County Police Department?

17 A This particular drawing was made at my request and
18 it's an attempt to depict what is said in words in the
19 regulations. It's an attempt to depict it in a picture
20 so that it's more understandable to both the patrolman
21 and the supervisors who have to enforce the regulation.

22 Q That picture was circulated to the members of
23 the Suffolk County Police Department and they wore their
24 hair as that picture is depicted, they would not be in
25 violation of the regulation?

MINUTES OF HEARING

Rapp - direct

14

1
2 A That's correct, sir.

3 MR. SWEENEY: I would like to offer that
4 picture into evidence at this time.

5 MR. WEXLER: No objection.

6 THE CLERK: Defendant's Exhibit C for
7 identification received in evidence.

8 (So marked.)

9 Q As to the grooming standard or hair regulation
10 as it exists today, could you state for the Court what
11 are the general reasons why the Suffolk County Police
12 Department has such regulations?

13 A One reason for the present regulations and, again,
14 recognizing the changing of men's hair styles lately and
15 the fact that most of our men in the department, the vast
16 majority are under the age of thirty, the compelling
17 reason for hair regulations at all is one of safety. We
18 have approximately 2,600 police officers in Suffolk
19 County. 80% of our patrol force drive one-man units.
20 We have a series of regulations concerning safety, specifi-
21 cations for police cars, specifications are arrived at to
22 give the police officer the safest vehicle to drive in.
23 We test weapons to make sure the police officers are
24 equipped with a weapon that will not fail in time of need.
25 We equip them with mace, a chemical device to cause

MINUTES OF HEARING

Rapp - direct

15

discomfort --

MR. WEXLER: I don't want to interrupt, but I don't see the firing of guns and the carrying of mace as germane to the issue.

THE COURT: I'll allow it only because it might tend to show the care with which the department exercises in safety and other areas and it may relate to some safety requirement in hairdress. I can see it coming, but I want to see if it does.

MR. WEXLER: Your Honor, I see why I said at the beginning I didn't know what route they would take. I said possible safety and that's what they're using.

THE COURT: At this point I can't see it, but I'll allow it.

Mr. Rapp, I had missed to this point the connection, but it may be developed so I'll listen to that.

THE WITNESS: I'll make the connection now if I may.

A In the opinion of the Suffolk County Police Department, long hair possesses a safety problem to an officer attempting to make an arrest. When I was a rookie police officer in the Safety of New York, we were taught how to

MINUTES OF HEARING

Rapp - direct

16

1
2 take a man off his feet by pulling on his hair and if I
3 may demonstrate to the Court with my hands, you grab a man
4 by the hair of the back of his head and rib straight down,
5 you can take that man off his feet in a matter of seconds.
6 His body has got to follow his hair.

7 THE COURT: Would you like to demonstrate on
8 our reporter who won't pass the test? Would you
9 mind, Mr. Silverman?

10 (Demonstration in Court.)

11 THE COURT: Repeat for the record what you just
12 did to the reporter.

13 THE WITNESS: I placed my hand at the rear of
14 the reporter's head and I grasped all the hair I
15 could in my fingers. I held my forearm touching the
16 spine of the reporter and demonstrated to the Court
17 that a straight down pull --

18 THE COURT: That's why you got the leverage,
19 touching the spine?

20 THE WITNESS: Right.

21 THE COURT: You grabbed the main -- you don't
22 mind, Mr. Silverman -- and pulled down forcefully.
23 You say that would knock the individual over?

24 THE WITNESS: That's right, his body would have
25 to follow the pull of hair, whichever direction you

MINUTES OF HEARING

Rapp - direct

17

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2 took.

3 MR. WEXLER: For the record, your Honor, may
4 I point out in grabbing the hair, he grabbed that
5 portion of the hair which was above the collar in his
6 demonstration.

7 THE COURT: I think so. Don't be so satisfied
8 in making your point. I imagine even that hair has
9 to stop some place and the lower it is the easier it
10 is to grasp. I imagine even a crew cut would make
11 it almost impossible.

12 MR. WEXLER: A baldy would be almost better.

13 THE COURT: That would be one of my questions,
14 whether this witness would suggest we shave every
15 policeman's head in Yul Brynner fashion.

16 THE WITNESS: I don't for a minute suggest
17 that. I merely say that an effort to provide for
18 the safety of our officers, we have to have the
19 right to control the length of hair.

20 THE COURT: That's the one place where safety
21 is a factor. You say that it eliminates the danger
22 of an offender or individual grabbing the hair and
23 rendering the officer defenseless?

24 THE WITNESS: That's correct, sir.

25 THE COURT: That would refer only to the length

MINUTES OF HEARING

Rapp - direct

18

1
2 of the hair in the back, have nothing to do with
3 sideburns, beards, mustaches; my correct, there,
4 nothing that could happen?

5 MR. SWEENEY: I would like to indicate to the
6 Court in effect there is no regulation as to
7 mustaches at this time.

8 THE COURT: How about beards?

9 MR. SWEENEY: There is a regulation as to
10 beards, not mustaches.

11 THE COURT: But that safety precaution would
12 not refer to beards, would it?

13 THE WITNESS: I would say it would.

14 THE COURT: It would?

15 THE WITNESS: Yes, by the same token if you
16 can grab a man by the back of the head by his hair,
17 if he had a beard, you can grab him by the beard
18 and make him go almost any way you want to go
19 merely by hanging on with sufficient strength.

20 Q Commissioner, you were stating to the Court
21 the general reasons for the regulation. Is safety the
22 only reason?

23 A No, an additional reason is the appearance, the
24 general appearance of a police officer. A police officer
25 is a public servant. He wears a uniform that has come to

MINUTES OF HEARING

Rapp - direct

19

be recognized as a police officer's uniform.

Q In line with that uniform, I would just like to show you page 35 of Defendant's Exhibit B. I ask you if that relates to uniform regulations as to uniforms?

(Handing to witness.)

A Yes, sir, it does.

Q Would you go on as far as neatness or appearance is concerned?

A Unlike some other police departments, Suffolk County does not require a police officer to purchase his own uniforms. Any police officer assigned to our police department is given his uniforms. When they wear out he's given new uniforms. We do this in an effort to maintain an appearance throughout the department of neatness. It makes for high morale when you look good, you feel good. When you feel good, you do a good job.

Q Do you regulate the color of the uniform?

A Yes, we do.

Q Do you regulate the color shoes?

A Yes, we do.

Q How about soxs, what kind of soxs?

A We regulate the color of soxs. They have to be black.

Q Do you regulate --

MINUTES OF HEARING

Rapp - direct

20

THE COURT: White shirt?

THE WITNESS: No, sir, blue shirt up to the rank of -- lieutenants wear white shirts with a blue uniform. Sergeant and patrolman wear blue shirts with a blue uniform.

THE COURT: Is the blue a particular tint or lightness?

THE WITNESS: Standard issue blue similar to the two officers who are present in Court, your Honor.

THE COURT: Thank you.

Q Do you also regulate hats?

A Yes.

Q Is the hat a part of the uniform?

A Yes.

Q Is a patrolman required to wear a hat while on duty?

A Yes, he is.

Q What type of hat is that?

A The standard eight point police hat.

Q Is the patrolman required to wear that hat at all times or are there occasions when he does not have to wear it?

A The department does not require an officer to wear

MINUTES OF HEARING

Rapp - direct

21

his hat while in the car, his radio unit. When he exits the vehicle, he has to put it on.

THE COURT: Has any survey been made in the community or maybe outside the community as to public reaction or acceptance of deviations from uniform policy? In other words, are police departments which permit individualism in communities held up to ridicule in any way? Does the public lose respect for the force in any way?

THE WITNESS: I don't know of any formal survey that would indicate that one way or the other. I have heard remarks from various sources as to members of the public commenting on hair. I have heard it from members of our own department, patrolmen themselves.

Q In your opinion, Commissioner Rapp, would there be an indication where the length of hair of a patrolman could interfere with his duties?

A Aside from the obvious problem while trying to effect an arrest, I can conceive of hair length that would interfere with his operating of a police vehicle during a pursuit chase. If his hat is not on and he's driving at a sufficient speed and his hair is long enough, I can see it

MINUTES OF HEARING

Rapp - direct

22

1
2 blowing in his eyes.

3 Q Does the Suffolk County Police Department have
4 various public relations programs as to the functions of
5 the police department in general?

6 A Yes, we do. We have a Community Relations Bureau.

7 Q Do you send patrolmen or uniformed officers
8 around to various civic groups or high schools representing
9 the police department?

10 A Yes, we do. We have a Regulation Speakers Bureau
11 that handles most of those assignments.

12 Q What's the purpose of that type of public
13 relations?

14 A Basically, it's to get the closer rapport between
15 the community and the police department. We find that
16 when a community understands what we're trying to do and
17 the resources that we have available to do it, that they
18 understand our problems and we on the other hand have the
19 opportunity to hear their problems and it makes for a
20 better relationship.

21 Q Is it essential for the functioning of the
22 Suffolk County Police Department that the community in
23 general have respect for the police department?

24 A I would say definitely, sir.

25 Q What would you say is the role of the uniform

MINUTES OF HEARING

Rapp - direct

23

1
2 patrolman as an example of the Suffolk County Police
3 Department?

4 A The uniform patrolman is the first line. He has the
5 first contact generally with any member of the public,
6 whether it's a traffic stop or a routine check or responding
7 to a call for assistance. The patrolman on the street or
8 in the car is the first one observed, generally by any
9 member of the public.

10 THE COURT: How many members do you have in
11 the Suffolk County Police Department?

12 THE WITNESS: We have 2,600 sworn officers.
13 It's approximately the fourth largest in the State
14 of New York.

15 Q Is the reason for this regulation as to this
16 blue uniform, the badge, perhaps even the revolver so
17 that the public can identify who is a patrolman and who is
18 not?

19 A Not only the public, but would-be perpetrators of
20 criminal acts. The purpose of the uniform is to let them
21 know the uniform is there. It's a prevention method
22 of preventing crime.

23 Q Would you say that the regulation as it now
24 exists is part and parcel to your regulation of the color
25 of their soxs as being part of their uniform?

MINUTES OF HEARING

Rapp - direct

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A Yes, sir.

Q Does this particular regulation relate only to male personnel of the Suffolk County Police Department?

A That's correct, sir.

Q How many female personnel are in Suffolk County Police Department?

A Presently employ 13 females.

Q This regulation has no affect as to females?

A No, it does not, sir.

Q Did you anticipate at some time that if in fact -- withdrawn.

Are any of these females assigned to active patrol duty in a car as other patrolmen would be?

A No, sir.

Q Do you anticipate at sometimes, perhaps you might each have to regulate the length of a female's hair if she was in this same category as on patrol duty?

THE COURT: Counselor is not objecting. It has nothing to do with the case. I have enough problems.

MR. WEXLER: I wasn't asking objection because I was asking that.

MR. SWEENEY: I was anticipating Mr. Wexler asking that.

MINUTES OF HEARING

Rapp - direct

25

1
2 THE COURT: You say it's discriminatory if you
3 don't have females.

4 MR. WEXLER: One of the factors is safety. It
5 only applies to men and Suffolk County does intend
6 to have females in the automobiles.

7 THE COURT: It's already been testified to
8 they have different duties. They don't encounter
9 muggers and --

10 MR. WEXLER: There is a pilot plan in effect
11 to place women in the cars and, therefore, it becomes
12 an issue what do they intend to do.

13 THE COURT: What they intend to do, I don't
14 think that's important.

15 MR. SWEENEY: I brought it out only for the
16 reason I anticipated Mr. Wexler making that argument.
17 This regulation concerns specifically male personnel.

18 THE COURT: I agree. If you have women doing
19 the same type of work, subject to the same hazards,
20 that were described by Mr. Rapp, I would be inclined
21 to agree that that would be power material encounter-
22 ing the position of the police department in which
23 it says it's a safety measure, but it isn't, as far
24 as I know, it isn't part of the female police
25 department's work, the female branch of the police

MINUTES OF HEARING

Rapp - cross

26

department.

MR. SWEENEY: I have no further questions at this time, your Honor.

CROSS-EXAMINATION

BY MR. WEXLER:

Q Commissioner Rapp, didn't you have police-women riding in patrol cars?

A Yes.

Q Commissioner, were they riding when this new hair regulation was in effect?

A Yes, they were.

Q Did the hair regulation apply to females riding in patrol cars?

A No, not at that time. No, sir.

Q Not at that time, does it apply to them now?

A No.

Q Do you have females walking patrol?

A On a temporary experimental basis.

Q Does the hair regulation apply to them?

A No.

Q Are they subject to great hazards or endanger because they have longer hair than the hair regulations?

A I would say they are.

Q Do you plan to protect the females by having

MINUTES OF HEARING

Rapp - cross

27

1
2 them follow the same rules and regulations as the men?

3 A I wouldn't say the same rules, but I do think we will
4 promulgate rules, yes.

5 Q So you do anticipate having rules affecting
6 females who will be in patrol cars and roaming the streets?

7 A Yes, sir.

8 THE COURT: How extensive or how long has the
9 experiment be going on?

10 THE WITNESS: We put each of the 13 -- 12 of
11 the 13 policewomen were put in police units for
12 two weeks.

13 THE COURT: Has that period expired?

14 THE WITNESS: Yes, it has. We ran that some-
15 time during the Summer.

16 THE COURT: There are no policewomen that are
17 on duty in patrol cars at the present time?

18 THE WITNESS: That's correct.

19 THE COURT: You're saying that the experiment
20 had occurred before you promulgated the amended
21 rule?

22 THE WITNESS: Yes, I believe it did.

23 THE COURT: You said it was the Summertime.
24 This happened in November.

25 THE WITNESS: That's correct, sir.

MINUTES OF HEARING

Rapp - cross

28

Q Do you have patrol women walking patrol?

A Not at the present time, no, sir.

Q Were they walking patrol when the new hair regulations went into effect?

A I don't believe so, sir.

Q How many uniform men are there in the Suffolk County Police Department?

A Approximately 2,600, sir.

Q Uniform?

A Uniform?

Q Approximately?

A Patrolmen?

Q No, uniform men.

THE COURT: I imagine even that excludes the undercover.

A 2,000, 2,100.

Q Of the 500 detectives, how many of them are undercover or narcotics which wear, are permitted and I understand have different regulations because of the nature of the job? I'm interested in those, the rule would affect as detectives who do not wear uniforms.

THE COURT: Let's understand whether the rule is applicable to other than uniform men, the 2,000, 2,100?

MINUTES OF HEARING

Rapp - cross

29

1
2 A Yes, sir, the rule is applicable, however, a
3 detective can request in writing to be exempt from the
4 hair regulations. That request, however, must show a
5 justification of the assignment and why he feels departure
6 from the regulation will assist him in performing that
7 assignment.

8 As Mr. Wexler mentioned there are narcotics detec-
9 tives, but there are others who are given an exemption
10 based on the type of work they're doing.

11 THE COURT: Any given exemption for personal
12 reasons?

13 THE WITNESS: (No response.)

14 THE COURT: A detective might be a member of
15 an amateur rock and roll band and feel that he would
16 like his hairdo to be atypical.

17 THE WITNESS: I don't know of any exemptions
18 based on that. Nor do I know of any requests based
19 on a personal.

20 THE COURT: The ones that want to look like
21 father and son.

22 THE WITNESS: We haven't had requests for those
23 reasons.

24 O Commissioner, so I understand, the new regula-
25 tion dated the 26th of November, '73, does that supersede
the old regulation?

MINUTES OF HEARING

Rapp - cross

30

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2 A If you take that regulation of November and replace
3 paragraphs A, B and C, and continue reading the rest of
4 the regulation, that in total is the grooming standards of
5 the department. I understand it's Sub-Section D, E and
6 F, they're still in effect.

7 Q So we have some clarification. The reason I'm
8 confused, the 2 regulation, 2-2.16 A, B and C. Under the
9 old regulation, it's 2-75.1, .2, .3, .4, .5. I'm confused.

10 A When the November, '73 order came out it amended
11 those pages in Defendant's Exhibit B. I had no reference
12 to this at the time I made the amendments.

13 Q Could you tell us, based upon the old or the
14 new, what's the hair regulation as of today?

15 A The present regulations are from Defendant's Exhibit
16 B, the November order amends this section (Indicating).
17 Section A, B, C, D is still in effect and E is still in
18 effect. I had no reference to this at all. I didn't
19 consult with this. I went right to the rules and amended
20 Sections A, B and C.

21 Q Commissioner, getting back to my question, how
22 many detectives are affected by this rule and regulation
23 who are not exempt for one reason or another? By
24 "detectives" we mean, those who wear ordinary clothes not
25 provided by the county.

MINUTES OF HEARING

Rapp - cross

31

1
2 A Perhaps 250.

3 Q Do these regulations affect the 250 who are
4 not in uniform, but in street clothes?

5 A Yes, sir.

6 Q Regulation, the new regulation, Paragraph A,
7 second sentence, "Hair will not go below the ears or the
8 collar." Does that mean hair can go over the ear or behind
9 the ear? What does that mean?

10 A By that, I meant and I believe President Johnson
11 meant that hair --

12 Q I'm interested in what you meant?

13 A I meant that hair would go behind the ear and not
14 over the ear.

15 Q If hair came out from a wind or so forth
16 over the ear, is that in violation?

17 A Not if caused by wind, sir, no.

18 Q Assuming it was caused by wind, but the patrol-
19 man never pushed it back, is he in violation?

20 A Technically, I suppose he would be.

21 Q So the violation becomes now how long it takes
22 him to get his hair back if it accidentally comes back?

23 MR. SWEENEY: Objection.

24 THE COURT: Overruled. I'll allow it.

25 A No, sir.

MINUTES OF HEARING

Rapp - cross

32

1
2 Q Do you feel that the hair going over the ear
3 is a safety hazard?

4 A The question is one of agree. How far over the
5 ear, below the ear? Does it go to the collar? Does it
6 touch your shoulder? Hair over the ear can stop here
7 (Indicating). The middle of the ear, the bottom? Can
8 it stop at the collar, the shoulder? The problem is
9 one of definition.

10 THE COURT: Two patrolmen stand up.

11 Q I show you two patrolmen whom you know. You
12 see their hair over their ears. Do you feel that's a
13 safety hazard to the two patrolmen whom you know?

14 A As they presently have it?

15 Q Yes.

16 A Might I suggest they be given some description in
17 the record what's the hair I'm looking at before I answer
18 the question, sir.

19 THE COURT: Surely.

20 Q We'll start with Officer Nordt.

21 THE WITNESS: May I do the description?

22 THE COURT: Surely.

23 THE WITNESS: I know Officer Nordt's hair
24 extends over his ear, but I can see his ear lobe.
25 Patrolman Brady, I know hair is on top of the ear

MINUTES OF HEARING

Rapp - cross

33

1
2 and extending not less than halfway down the ear.

3 With that view in mind, I would say no, Mr. Wex'ler,
4 that's not a safety problem.

5 Q So hair touching or going over the ear as
6 described by yourself and the two patrolmen is not a
7 safety hazard?

8 A That's correct.

9 THE COURT: Is it a violation of the present
10 regulation?

11 THE WITNESS: Yes, it is, sir. Might I
12 explain how we arrived at that particular regulation?
13 Would the Court be interested?

14 THE COURT: Just answer the questions.

15 Q If sideburns went one inch below the bottom
16 of the ear, would that be a safety hazard?

17 A No.

18 Q If someone had sideburns one inch below the
19 bottom of the ear, would he be in violation of your rules
20 and regulations?

21 A Yes, he would.

22 Q You told us that most of the men in the
23 Suffolk County Police Department are under thirty; is that
24 correct?

25 A Yes, sir.

MINUTES OF HEARING

Rapp - cross

34

1
2 Q In the community, sideburns going one inch
3 below the ear, to the general public, is that acceptable,
4 does it seem to you?

5 A Yes.

6 THE COURT: Well, this witness is giving wide
7 discretion in expressing opinions. I don't know
8 what it's based on.

9 MR. WEXLER: I didn't know either when he did.

10 THE COURT: I say most surveys -- I don't know
11 how many people the commissioner has talked to. I
12 don't know how long he's living in the community,
13 what community he's talking about. Certainly, public
14 rejection on hair styles by a vast majority of
15 the people could bring the department disrepute.
16 If policemen, for example, were allowed to go
17 unshaven for three or four days and walk around in
18 a rumpled uniform, open collars, appear to be in
19 total disarray, you can imagine that the public
20 would soon lose respect for it.

21 Now, how far do you go? When does the public
22 react? When policemen in New York first took their
23 jackets off and were allowed to walk the streets
24 in the Summer heat in their shirts, I don't quite
25 remember if it was a half sleeve shirt -- there was

MINUTES OF HEARING

Rapp - cross

35

1 a reaction by the public and it may have taken
2 days or weeks before they accepted it. Now, once
3 they accepted it it was all right, but it had to be
4 uniform, it had to be neat. That's the trouble
5 with your questions, as to whether the hair below
6 the ear -- now the two policemen that stood up are
7 neat. They appear to be well groomed. I can't
8 see why the public won't accept hair styles of
9 this kind. It is not a safety hazard, but then the
10 regulations have to draw a line and no matter where
11 you draw it, you can take it because you can show
12 by example that there's no reasonable basis for the
13 borderline case. It's like deciding a close case in
14 Court. No matter where you draw the line you can
15 find a case that's so close that would result in a
16 hardship or even an injustice. That's the problem
17 with these things, regulations. Every time you draw
18 a line, there's someone who can show that there's
19 no basis for it.
20

21 I think the test is whether in the main, not
22 that there might not be an exception, not that there
23 might be an individual hardship, but for the entire
24 police department, for the public as a whole, is there
25 a need? You know when we talk about sideburns, we

MINUTES OF HEARING

Rapp - cross

36

1
2 talk about how bushy they are. We talk about beards,
3 of course beards in and of themselves are unacceptable
4 No one complained about Charles Evans Hughes when he
5 was chief justice. Would they if he were a police-
6 man? Maybe not. Would it be a safety hazard? I'm
7 not sure. So when you're talking about personal
8 grooming you and I know that someone can comply with
9 these rulings and look very sloppy, unacceptable.
10 Does that mean the one who complied will not bring
11 dishonor to the department while one that does not
12 will? No, I don't think so. You take individual
13 cases. I think it's difficult to make an argument
14 one way or the other on individual cases. That's
15 why I'm asking these gentlemen to stand up. It goes
16 to prove these gentlemen, even in violation of these
17 regulations, are well groomed. I don't think they
18 present a danger to themselves, but I don't know
19 where the argument leads.

20 MF. WEKLER: I think -- and though I'm not
21 a believer in long hair and I'll state that on the
22 record. I don't believe in ponytails, but I think
23 it logically leaves to leave it alone and it will
24 seek its own level.

25 THE COURT: My personal attitude? We had a

MINUTES OF HEARING

Rapp - cross

37

1 Court Reporter that had a ponytail. One judge
2 literally threw him out of the Courtroom. He came
3 to me and asked whether I had objection. I said
4 not at all. I had law clerks and I interviewed a
5 law clerk and I asked my then law clerk if he should
6 shave the beard before he came for an interview. I
7 said not at all. I've had law clerks with beards.
8 Well, this is the first one -- of course, I have a
9 female law clerk. I had personnel ask whether there
10 was any objection to coming to Court, females coming
11 to Court in slacks. No. I want people to dress
12 and act as they want to as long as it doesn't
13 impinge on anyone else's freedom and it doesn't in
14 any way impair the effectiveness of the force.
15 That's the real question. That's why it's interest-
16 ing to have surveys to see public reaction. It may
17 very well show people don't mind. Some people
18 react violently. Some don't care. For myself,
19 as I recall it, I thought of the -- I don't know
20 whether I said it in my opinion because I haven't
21 read it since I originally wrote it -- uniform to
22 me means uniform. Now, absolutely uniform? Nothing
23 is ever an absolute performance and acceptance.
24 So that the public sees a man in uniform and
25

MINUTES OF HEARING

Rapp - cross

38

1
2 recognizes him as a physical representative of
3 government, one that they can respect and look up
4 to, I think that's important. It may sound old-
5 fashioned. I think the policeman serves a very
6 important purpose in our society, maybe more so now
7 than ever.

8 MR. WEXLER: Don't we want him to be a part of
9 society?

10 THE COURT: That's right, that too.

11 MR. WEXLER: I agree he should be neat, have
12 a uniform, be clean. Is he supposed to be the
13 military type hair or can he be with society?

14 THE COURT: Now we come to the very close
15 questions. Where does it interfere with his
16 personal right? Where does it affect the public and
17 where does it affect his effectiveness? Now we come
18 to these borderline cases. That's what I'm talking
19 about. I won't have an easy time of it.

20 MR. WEXLER: That's the reason I pointed out,
21 most of the men are under thirty.

22 THE COURT: Frankly, I felt it was that
23 policemen were more subject to these uniform
24 regulations than the military, for this reason that
25 they had a choice before they entered the force of

MINUTES OF HEARING

Rapp - cross

39

1
2 becoming a uniform law enforcement officer or not.
3 The fellow drafting into the army, he has no choice.
4 He's told. You say to a policeman, "Look. These
5 are the regulations, do this, do that." If you want
6 to accept the appointment, you comply. The Court
7 of Appeals in its infinite wisdom disagrees. They
8 say no, they're not a "parallel military force."
9 They have jobs as civil service employees. I must
10 accept that until the Supreme Court says, "No,
11 they are in a sense a parallel organization."

12 You can continue with your examination.

13 MR. WEXLER: I will be very brief.

14 THE COURT: I don't want to cut you off. I
15 may bring something up that might be helpful.

16 MR. WEXLER: I think we're wasting words. I
17 think the Court knows the issue.

18 THE COURT: Do you know of any surveys?

19 MR. WEXLER: None.

20 THE COURT: That show public reaction?

21 MR. WEXLER: None.

22 THE COURT: Sampling?

23 MR. WEXLER: None. I don't think there are
24 any.

25 THE COURT: Then it must be wasted on my

MINUTES OF HEARING

Rapp - cross

40

1
2 impressions which aren't right either. How would
3 I react? I don't know at this point how I would
4 react. Again, it's almost what the extent is. The
5 sideburns, are they so bushy even though they're
6 not long, that they're seeming to be unruly and
7 difficult to manage? When he walks down the street,
8 is some citizen of advanced age or some youngster
9 that passes by say, "My God, they're getting to
10 look like the out crowd or the in crowd." Or will
11 they just say -- or not even recognize the differ-
12 ence?

13 How many of the people out there, how many
14 in number have hair beyond, lower than their ears
15 and bushier and hair below the neck? So that it
16 doesn't even make a difference. I assume that if
17 you had policemen that had rings through their
18 nose, you would say, "Well, that department can
19 legislate on," but if everybody out on the Island
20 started wearing rings in their nose, "That's all
21 right. There's nothing wrong with that." Trying
22 to regulate anyone's personal conduct is difficult,
23 at best. No question about it. We've learned
24 that in the obscenity laws. We've got a tiger
25 by the tail in my humble opinion. I enforce it.

MINUTES OF HEARING

Rapp - cross

41

1 I see it enforced because I try to interpret the
2 law. My own personal view would be entirely
3 different. As long as young children are protected,
4 as long as people are not offended. If all it means
5 that those who pay their fee, see what they want to
6 see, personally, that's all right with me. Again,
7 it's an area in which the legislator and the Courts
8 have tried to limit someone's personal freedom.
9 It's difficult. Here, it's in a different respect.
10 but we have the same problem.
11

12 I can see an effort by police department
13 and at least some of the officers to try to work out
14 a regulation, but you're never going to get one that
15 pleases everybody. There's going to be one fellow
16 who likes a ponytail. You don't like. Why shouldn't
17 he have it?

18 MR. WEXLER: I agree. This is right.

19 THE COURT: But if the community out there
20 holds the man up to ridicule and if it reflects
21 upon the department and the effectiveness of people,
22 people won't respect him and I'm not talking about
23 100% of the people, substantial majority, it may
24 very well be a proper area for regulation.

25 MR. WEXLER: There isn't sufficient --

MINUTES OF HEARING

Rapp - cross

42

1
2 THE COURT: Why should an officer have to
3 have a uniform? Suppose one of the officers sitting
4 before me decided that he would like red striped
5 pants?

6 MR. WEXLER: There they can make out an easy
7 good case.

8 THE COURT: Why? To identify the policeman?

9 MR. WEXLER: Yes.

10 THE COURT: You know that's an excuse. You
11 can identify the policemen. If enough didn't wear
12 uniform pants but enough wore a uniform jacket,
13 they'd be identifiable. Look how easily people
14 are identified on a basketball court in quick
15 movement. Nobody has to have the complete uniform --
16 skin is showing -- you see white and the red of the
17 other. You know that. Identifiable? That still
18 doesn't matter. You know in the movies when you see
19 the marshals out west, they don't have uniforms.
20 They just have a shield, six point shield and he
21 doesn't have to say, "I'm Marshal Dillon" before he
22 announces who he is. You've seen that shield.
23 He's identified, right? Well, it might very well
24 be a safety measure because if you require reaction,
25 it may very well be the more identifiable uniformity

MINUTES OF HEARING

43

you have the better you identify it. At dawn or thick of the night, it may be that a full uniform is better. I say it's really a matter of agree. How far do you go? When do you trespass on someone's personal freedom and when is it, as the Court of Appeals said, a regulation that's a public interest or a public need? I don't know how much of this can be left to the discretion of the enforcement authorities, the disciplinary authorities in the department. That may or not be related to this. They showed pictures of what you may or may not have. You indicated there's a technical violation if somebody's hair goes over the ears. I think that that was a very strict interpretation of the regulations. I think that if the hair could reasonably be groomed to conform to the regulations, that would be enough. I don't think it has to conform during sleeping hours or those temporary moments when the grooming is upset. If the hair is so cut that it can conform to me, that would be a reasonable interpretation and that's it. The mere fact it falls over the ears would not be a violation. I'd be ready to entertain a writ of mandamus if anybody discharged anybody for the moment the hair fell

MINUTES OF HEARING

Rapp - cross

44

1
2 over or even that way for an hour or even that way
3 for ten hours or eight hours while he slept. You
4 may continue. I may suggest if anyone is ready to
5 make any kind of a survey, if you think it's relevant,
6 and it's not too expensive, if you want to do some
7 research and find whether community reaction or evidence
8 of taste is available.

9 MR. WEXLER: I'll defer to them since they
10 have the burden of proof. You probably have the
11 money, though.

12 Your Honor, I want to bring up the point
13 concerning the agreement, the alleged agreement
14 between the president of the PBA and the police
15 commissioner.

16 Q Police Commissioner --

17 THE COURT: Incidentally, I don't think that
18 because the commissioner came to agreement with the
19 PBA that that means that everyone is bound by it,
20 and it meets constitutional standards.

21 MR. WEXLER: I wanted to point out --

22 THE COURT: You can go into it.

23 Q This is an agreement for a period of six
24 months; isn't that correct?

25 A Initially, yes, sir.

MINUTES OF HEARING

Rapp - cross

45

1
2 Q There came a time when your department issued
3 two paragraphs showing what the hair regulation would be;
4 is that correct?

5 A Yes, sir.

6 Q And it wasn't that which was offered in
7 Exhibit C, but another photograph?

8 A That's correct, sir.

9 Q Which was really not in compliance or following
10 the regulation that you and the president temporarily
11 agreed to?

12 A That's correct.

13 Q When that picture was shown around to the
14 members of the department, there was a reaction to that,
15 wasn't there?

16 A I understand there was, sir, yes.

17 Q The membership said they could not go along
18 with it anymore; is that correct?

19 A (No response.)

20 Q Anyway, you were advised?

21 A I don't know what the membership said, sir.

22 Q You were advised the six-month trial period
23 had fallen apart because of the picture sent out by the
24 police commissioner's office?

25 A No, sir, I was not told that.

MINUTES OF HEARING

Rapp - cross

46

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2 Q But you were told the agreement is off; isn't
3 that correct?

4 A No, I wasn't. What I was told was that the PBA
5 had voted to continue the suit. That's what I was told.

6 Q That they were not -- within the six-month
7 period, they have not agreed to go along with the temporary
8 agreement?

9 A That's correct.

10 Q It was the understanding that the originate
11 of the agreement would be a trial period for six months
12 and each party can declare it null and void and continue
13 with the lawsuit if they want?

14 A That's my understanding.

15 Q So there was no final agreement -- one other
16 thing, police commissioner, men walking the streets and
17 patrolling have to wear their hats, don't they?

18 A Yes, sir.

19 Q When hats are on securely, hair cannot blow
20 in the eyes?

21 A I would say that's correct, sir.

22 Q When you refer to the example that you can
23 pull someone's beard in pulling him down, can't you pull
24 a tie just as readily in pulling him down?

25 A That's true.

MINUTES OF HEARING
Rapp - cross/redirect

47

1
2 Q You can pull any portion of clothing just as
3 readily?

4 A Well, I wouldn't say any portion of the clothing, but
5 portions of the clothing could be grabbed, yes, sir.

6 MR. WEXLER: No further questions.

7 REDIRECT EXAMINATION

8 BY MR. SWEENEY:

9 Q Commissioner, could you just briefly state
10 why the regulation affects those some odd 250 detectives
11 who have not requested or have a special assignment allow-
12 ing them to have longer hair?

13 A Why the rule applies to them?

14 Q Yes.

15 A These are our general service qualified detectives
16 who meet and deal with the public daily. They are people
17 that, detectives that meet people who come in to complain
18 their house was burglarized. They have a more public
19 oriented type of job where the other men are doing under-
20 cover type assignments.

21 Q Is a detective a different rank from a patrol-
22 man for example?

23 A Civil service wise, a detective is a patrolman, but
24 he is a patrolman detailed at the discretion of the police
25 commissioner.

MINUTES OF HEARING
Rapp - redirect/recross

48

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Q At the discretion of the commissioner, could the detective be told to be in uniform?

A Would take even less than that.

Q Is he required to keep a uniform?

A Yes, he is.

Q There's one issued to him?

A Yes.

Q That's all of those 250 or all detectives?

A Yes, sir.

Q Looking at these two officers, would you say in your opinion as the police commissioner, that they would be subject to discipline as a result of their hair length that you see today?

A Probably not.

Q Would you say their hair length are in substantial conformity with the regulation?

A Substantially, yes.

REXCROSS EXAMINATION

BY MR. WEXLER:

Q Their hair length is in substantial conformity with the order?

A With the exception of the hair over the ears.

Q We're talking about hair over the ear.

A What do you mean by "substantial"?

MINUTES OF HEARING

Rapp - recross

49

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2 Q All right, are they in violation, considering
3 their length of hair and their ears?

4 A Technically speaking, yes.

5 Q Could a superior officer charge them with a
6 violation of the rules and regulations and be placed on
7 trial in disciplinary proceedings?

8 A Yes, they could.

9 Q Even though they're not a safety hazard or
10 any other hazard as far as you're concerned?

11 A That's correct.

12 Q Just because the commissioner doesn't like
13 the way they style their hair?

14 A No, sir. Because the commissioner has got to have a
15 limit. The supervisor has got to know how low that hair
16 can go. You cannot have a regulation that patrolmen
17 shall be neat and let it stop there. If you find that a
18 patrolman that everybody agrees would be unneat and you
19 charged him, I doubt the constitutionality of any disci-
20 plinary action. A patrolman must have standards that he
21 must know he has to conform to before he can be guilty
22 of any regulation.

23 THE COURT: Is any disciplinary proceeding
24 pending against either of these two patrolmen?

25 THE WITNESS: As of right now, no disciplinary

MINUTES OF HEARING

Rapp - recross

50

1
2 proceeding pending against any patrolman on hair
3 regulation.
4

5 Q On the hair regulation because of this temporary
6 agreement we've had on seeing if we can work it out?

7 A Not necessarily, sir. I didn't tell the supervisors
8 they could not enforce that regulation.

9 Q Didn't you tell the supervisors to "Go soft
10 on hair, we're trying to work it out. Let's not shake the
11 boat"?

12 A Not in those words.

13 Q Not in those words, but words and substance,
14 the same saying, "Don't rock the boat while we're trying
15 to work something out." Withdrawn.

16 Didn't we have hair disciplinary actions in the
17 past before the agreement?

18 A Yes, sir.

19 THE COURT: When was the agreement terminated?

20 THE WITNESS: As far as the Suffolk County
21 Police Department, sir, it has not terminated. That's
22 the regulation still in force and effect.

23 THE COURT: I'm talking about the understanding
24 that you would not institute disciplinary actions for
25 violations.

THE WITNESS: That was never my agreement,

MINUTES OF HEARING

Rapp - recross

50 A

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2 sir. I never agreed not to institute disciplinary
3 actions against a patrolman in violation of the new
4 November regulations. I never agreed to that.

5 THE COURT: None were instituted since
6 November?

7 THE WITNESS: That's correct, sir.

8 Q We have many hair disciplinary cases before,
9 didn't we?

10 A Prior to July, Mr. Wexler, I couldn't comment. I
11 don't know how many you did have.

12 Q You know of one case where a police officer
13 quit the job because he was in violation and refused to
14 conform?

15 A Yes, I do.

16 MR. WEXLER: Nothing further.

17 THE COURT: Anything further.

18 MR. SWEENEY: No.

19 THE COURT: You may step down. Thank you.

20 (Witness excused.)

21 MR. WEXLER: I'm not going to call any witnesses.

22 THE COURT: You rest on this?

23 MR. WEXLER: I'll rest on the testimony. I
24 think the Court knows the issue better than I do.

25 THE COURT: Do you have any reported cases of

MINUTES OF HEARING

51

similar regulations upheld?

MR. SWEENEY: Yes, I do, your Honor. I have a case which I would rely on heavily because it concerned the Nassau County PB, and exact regulation to the old regulation in this case.

THE COURT: Do you have a brief?

MR. SWEENEY: I have a copy. The brief I submitted in the Circuit Court of Appeals.

MR. WEXLER: That was before the Circuit Court of Appeals he's relying on.

THE COURT: Does that recite the case in question?

MR. SWEENEY: Greenwald against Frank.

THE COURT: You say that's a Nassau County case?

MR. SWEENEY: Yes. The lower Court decision was 70 Miscellaneous Section 632, 334, New York Sub-Section 680, affirmed as modified, Appellate Division 337, New York Sub-Section 225, and that case was affirmed on June 1, 1973, by the Court of Appeals of the State of New York, affirmed unanimously, no opinion. I don't have the Court of Appeals' citation. That was the case held.

THE COURT: Was that discussed in the Court of

MINUTES OF HEARING

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1
2 Appeals?

3 MR. SWEENEY: Certainly was, your Honor.

4 THE COURT: I have a slim opinion. Where did
5 the Court of Appeals referred -- I see it. Who
6 decided that case in Nassau County?

7 MR. SWEENEY: Justice Bernard F. McCaffrey.
8 He wrote an opinion. I was going to quote from that,
9 but if your Honor is going to read it, there's no
10 necessity.

11 THE COURT: That came out of the Supreme
12 Court, Nassau County?

13 MR. SWEENEY: That's correct. It's the exact
14 same situation. It's the PBA suing -- identical to
15 this case. If I just may read the Appellate
16 Division's opinion? May I your Honor?

17 THE COURT: Surely. "The rationale of the
18 modest regulation in question concerning personal
19 appearance setting forth rules as to haircuts, side-
20 burns, mustaches and beards is that there should be
21 neatness and discipline in a large quasi military
22 organization such as the Nassau County Police
23 Department so that the general public will have
24 respect for the members of the department. In our
25 opinion, this regulation does not raise issues which

1
2 rise to the dignity of constitutional questions."

3 I would submit to the Court that the Circuit
4 Court of Appeals while saying, "We make no view on
5 the merits," is merely saying that there are
6 situations where perhaps the regulation of hair
7 would raise a constitutional question. I think that's
8 the sum and substance of their sending it back and
9 saying, "Have a hearing on it, or at least a trial
10 as to what are the reasons because we don't have
11 enough reasons before us."

12 There was a case before the Supreme Court
13 involving the regulation of hair in public schools.
14 That case was Karr against Schmidt, 401-US-1201.
15 Justice Black, writing in that case, says the
16 impression given the Courts today about the length
17 of hair. I quote on page -- this is from the
18 Supreme Court, any one Supreme Court, page 593. "The
19 hair issue has created or is about to create a
20 national crisis. I confess my inability to under-
21 stand how anyone who does classify this hair length
22 case. The only thing about it that borders on the
23 serious to me is the idea that anyone should think that
24 the Federal Constitution imposes on the United
25 States' Courts the burden of supervising the length

MINUTES OF HEARING

54

1 of hair that public school students should wear."

2 This case does not involve public school students.

3 I think that's a civilian category. There are many
4 cases on it, but just as analogy, is this Court --
5 are we to be back here in six months from now?
6

7 In other words, if this regulation is not rational
8 or it has no rational basis, there are two issues.

9 Number one, can the police commissioner regulate
10 hair length at all as part and parcel of neatness,

11 appearance, safety, the fact of maintaining some
12 discipline in a police department? Sure there's

13 going to be exceptions. There's bound to be. I

14 suppose that's why they have hearings. If somebody
15 was -- a charge leveled against them, perhaps even

16 in this case, perhaps hair a little over the ear,

17 maybe that isn't unreasonable or maybe when it's

18 before one of the powers of the deputy commissioner,

19 to sit and hear cases to say, "That isn't what the

20 regulation is all about. When we go to". When

21 we go to Court to test the statute, they say that's

22 not the intent. The intent of this regulation is to

23 have some kind of conformity in appearance, a

24 general conformity. You can knit-pick at this

25 regulation. As a matter of fact, I'm sure if next

MINUTES OF HEARING

55

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2 week the Suffolk County Police Department says we're
3 going to issue everybody white soxs, well, I'm sure
4 the law enforcement will probably still be the same.
5 The question is, as your Honor has pointed out, what
6 about the fellow who comes in unshaven or the hair
7 all over the place. It's to keep some kind of a
8 general rule. There's going to always be an
9 exception. At issue here is just the right of the
10 commissioner to regulate.

11 THE COURT: We're almost on a collision course
12 with the possibility of a challenge to vagueness.
13 Even a statute that says, the regulation that says,
14 "neat," what does that mean? It's a variable standard.
15 I am trying to think of instances where, instances
16 in my life or your life for a long period of time
17 you've seen someone -- he never looked neat. He can
18 go out and buy a \$300.00 suit, come out of the barber,
19 have just taken a bath, have the newest clothes and
20 still, for some reason, to you, look dirty. These
21 individual tests are difficult to regulate. Can the
22 commissioner promulgate rules that are so vague as
23 to put officers in jeopardy of their jobs by failure
24 to adhere to a vague regulation? This at least makes
25 an attempt to specify and in making an attempt to

MINUTES OF HEARING

56

1
2 specify, leaves open the possibility of objection,
3 as I say, close cases. Neat and still in violation.
4 Safe, but still in violation. That's the problem.

5 MR. SWEENEY: Perhaps, your Honor, in time --
6 just as the regulation has been amended now, it may
7 be amended again. It's perhaps just as they delete
8 it, I think one of the problems with regard to
9 mustaches was whether they went below the lip. Before
10 that regulation I suppose this officer (Indicating)
11 would have been in violation. (Now that part has been
12 modified so he's certainly not in violation. I
13 think it's at least a good faith attempt on the
14 commissioner to have some kind of regulation, some
15 reasonable regulation. There are some people, I
16 suppose, who can wear mustaches like that that look
17 terrible, also that do not trim them, that do not
18 look neat.

19 THE COURT: As I recall it, Holmes' mustache
20 was over his lip. They used to call it soup
21 strainers. Because it was Mr. Justice Holmes, I
22 suppose he looked signified or Mr. Chips in the
23 movies had one that came over his lip. That's why
24 I say it's difficult to fix standards for these
25 personal appearance requirements.

MINUTES OF HEARING

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3 MR. SWEENEY: Well, in summary, I would like
4 to say that it is our position -- I think the sum
5 and substance of the complaint had been that the
6 regulation as it stood then was unreasonable rather
7 than saying there should be no regulation at all.

8 THE COURT: Haven't these regulations been
9 tested any place else in the country since this
10 Court of Appeals' decision came out?

11 MR. SWEENEY: Not to my knowledge, your Honor.
12 In fact, I have many calls in my office saying what
13 is happening in this case because --

14 THE COURT: I had a few calls, one from Justice
15 Meyer because he had a firemen's case out there and
16 wanted a copy of my opinion. This was before the
17 Court of Appeals reversed. I don't know what he did
18 with that.

19 MR. SWEENEY: That went to the Court of Appeals.
20 That was firemen. It was a different regulation.
21 It's a different category, entirely. The Court sent
22 it back here to show some public need. Commissioner
23 has testified to safety, to neatness that the public
24 expects some kind of visible sign of law enforcement
25 to have a proper appearance. There's been testimony
that it's part of the uniform, just as much as the

MINUTES OF HEARING

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fact that the uniform may be blue and there's a badge, revolver, et cetera, and lastly, that it does maintain some kind of border within a police force.

The legitimate stated interest the Circuit Court mentions, the enforcement of the laws of the State of New York, certainly a legitimate state interest. The regulation itself, it's not so tight. If somebody violates a regulation, it's like anything else, there's a charge leveled and there are hearing procedures. It's not cut and dry "You're off the force," or anything to that effect at all. I find myself hard pressed as your Honor did, to argue the case where a patrolman is assigned outside as a detective. Now he is not in that uniform and he is supposed to look like a civilian. He's supposed to blend in with the community, so to speak. Whether or not how long his hair could be? The only thing I have to say to that he is always subject to the discretion of the commissioner. He is required to have a uniform and if that is there, then there has to be some regulation there also, although I have to admit my argument is certainly not as strong with the uniform patrolman. It's my position the regulation should stand so that the Suffolk County Police

MINUTES OF HEARING

59

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2 Department can present the standard uniformly. to
3 the outfitted group and representing -- I disagree,
4 a quasi military force with dignity, well identified
5 and recognizable to the public being served.

6 THE COURT: Would you like to submit anything
7 further or are you resting on what you are saying?

8 MR. SWEENEY: As to the law, Greenwald against
9 Frank is certainly as specific as it's ever going
10 to get. I think probably the most predominant case
11 in the country. It's a Court of Appeals' decision.
12 There is no decision on the merits at this time. The
13 Circuit Court while they said many things are saying
14 it by way of dicta, perhaps by way of guidelines to
15 say, "Take it seriously when it goes back." Other
16 than that, I would state Greenwald against Frank as
17 precedent for your Honor upholding the regulation
18 as being a modest regulation, as being reasonable
19 and being something within the police commissioner's
20 powers. Thank you.

21 THE COURT: Mr. Wexler, are you aware of any
22 decision on preparing regulations, fire or police?

23 MR. WEXLER: Long Island Conductors. Same
24 hair regulation, same argument as safety.

25 THE COURT: Some clerk thought I should have it

MINUTES OF HEARING

60

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2 as a related case, under our rules of individual
3 assignment, if a case is related, it goes to the
4 Judge who had the previous case, but I didn't think
5 it was related and I directed it go into the wheel
6 and I think Judge Constantino had that one.

7 Frankly, the same problems, in my humble
8 opinion and I made that determination as a Chief
9 Judge and not as a District Judge. It just occurred
10 to me that there is a different kind of need for
11 regulation in the police department or even the
12 fire department as there is in the Long Island
13 Railroad. Frankly, I can see little reason for the
14 Long Island Railroad.

15 MR. WEXLER: They claimed the very same thing.
16 At the beginning when you said -- I didn't know
17 they were coming in on safety or cleanliness or dis-
18 cipline as they did in all three in the conductors
19 case.

20 THE COURT: How many attackers -- conductors
21 as policemen? Policeman's job is dealing with the
22 public a good part of the time. The conductor meets
23 the general public, people going to business, shopping,
24 coming and going back. They have obstreperous
25 individuals once in a while. The need is less there

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2 than in the police department. Are you aware of
3 Justice Meyer's case in Nassau County? I never got
4 a copy of his opinion. I don't think he followed
5 mine.

6 MR. WEXLER: He distinguished it because they
7 were voluntary firemen involved, used that as the
8 distinguishing factor.

9 THE COURT: Were these only voluntary?

10 MR. WEXLER: Only voluntary. That distin-
11 guished it from the other.

12 I would like to be heard briefly, your Honor.
13 I realize my friend --

14 THE COURT: Excuse me, were you in the Green-
15 wald case?

16 MR. WEXLER: No.

17 THE COURT: Do you know the lawyers who were?

18 MR. WEXLER: I know the lawyers who were.

19 I know the Greenwald case and I know it was
20 referred to in my friend's brief and he argued it
21 before the Circuit Court of Appeals. They answered
22 the issue specifically and they refer to the case
23 and they do distinguish it on the two points. Number
24 one, the police are no longer a quasi military. It's
25 a constitutional issue.

MINUTES OF HEARING

62

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2 THE COURT: I thought they came to a different
3 conclusion, that's all.

4 MR. WEXLER: They came to a different conclusion
5 in the Greenwald case. I agree. I think this Court
6 understands the issue. I don't intend to -- I
7 planned to use the hackneyed thing, Christ,
8 Mohammed, Confucius would be in violation, Grant,
9 Lincoln and so forth. You know, --

10 THE COURT: I don't think they would make the
11 police force.

12 MR. WEXLER: The hair regulation. The more
13 significant thing, I'm a great believer in law. Some-
14 how when the law doesn't fit it, it means a law
15 shouldn't be there. The law doesn't fit in here.
16 We can't work -- I have to agree with them -- they're
17 trying to draw lines. I'm trying to knock the lines
18 down. In a field of this, it just doesn't fit even
19 though they have the burden of proving this case, of
20 course, they can't prove it. It's like the obscenity
21 cases. They'll go on and on until we let it seek
22 its own level. It will. It's just a matter of time.
23 They say the police department is acting in good
24 faith. I have to disagree. We had to bring them to
25 Court. We had to come back again to get changes.

MINUTES OF HEARING

63

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2 There wouldn't have been changes. Leave it alone.
3 It will seek its own level. I think I can say that
4 based upon law we know, when things don't work
5 legally, something is wrong. The law shouldn't
6 apply and leave it alone. Thank you, your Honor.

7 THE COURT: I'm disturbed by one phase of the
8 case. That's the proof as to whether the police
9 department loses its effectiveness because of the
10 length of hair and, of course, --

11 MR. SWEENEY: With regard to the public surveys.

12 THE COURT: That's right, Commissioner Rapp
13 just said that some members of the department have
14 indicated that they object to it. They don't like
15 it. They don't think it's right and some individual
16 members of the public feel that way. Well, it's
17 easy to get support for both sides. He didn't
18 express an opinion as to how the general public felt
19 and the real testimony is the description of the
20 hazards that place policemen in jeopardy by reason
21 of long hair, long beards. Did you intend ordering
22 a copy of these minutes?

23 MR. SWEENEY: Not at this time.

24 THE COURT: I have to make findings. I find
25 it difficult.

MINUTES OF HEARING

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MR. SWEENEY: In that case, I'll order a copy.

MR. WEXLER: We'll submit it to the Court, your Honor.

THE COURT: I don't think there's any need for expediting or giving me a daily on this. It usually takes a week or ten days. If you're not in a hurry? Then that would be good enough.

MR. SWEENEY: The Court is increased substantially.

THE COURT: Decision reserved. If anything happens between now and the time I file my findings and write my decision, that you become aware of, I appreciate your advising me of it. I'll read all the opinions in Greenwald against Frank.

* * *

MINUTES OF HEARING

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I N D E X

Witnesses

Direct

Cross

Redirect

Recross

Robert C. Rapp

8

26

47

48

EXHIBITS

Defendant's

For Id.

In Ev.

A

New Regulation

8

B

Rules & Regulations
of the Suffolk County
Police Department

10

B1

Grooming Regulation

10

B2

" "

10

DECISION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 862 -- September Term, 1972.

(Argued June 14, 1973

Decided August 22, 1973.)

----- X
THOMAS DWEN, as President of the Suffolk County
Patrolmen's Benevolent Association and THOMAS
DWEN, Individually,

Plaintiff-Appellant,

v.

Docket No.
72-1037

JOHN L. BARRY, Commissioner of the Suffolk
County Police Department,

Defendant-Respondent.

----- X
Before : KAUFMAN, Chief Judge
SMITH, Circuit Judge, and
BRYAN,* District Judge.

Appeal from denial of preliminary injunction and summary
dismissal of action by patrolman seeking to invalidate hair grooming
standards adopted by Suffolk County Police Department, in the United
States District Court for the Eastern District of New York, Jacob
Mishler, Chief Judge.

*Of the United States District Court for the Southern District of
New York, sitting by designation.

DECISION

Reversed and remanded.

LEONARD WEXLER, Smithtown, N. Y. (Richard T. Haefeli,
Smithtown, N. Y., of counsel), for Appellant.

PATRICK A. SWEENEY, Riverhead, N. Y. (George W. Percy,
Suffolk County Attorney, Riverhead, N. Y., of counsel),
for Appellee.

SMITH, Circuit Judge:

This is an appeal from denial of preliminary injunction and summary dismissal by the United States District Court for the Eastern District of New York, Jacob Mishler, Chief Judge, of a civil rights action brought by Dwen, individually and as president of the Suffolk County Patrolmen's Benevolent Association, seeking to invalidate hair grooming regulations of the Suffolk County Police Department¹ as in violation of the patrolmen's rights under the

1 Order Number 71-1 Amending Rules and Procedures
POLICE DEPARTMENT, COUNTY OF SUFFOLK, N. Y.

X GENERAL
SPECIAL

PERSONNEL ORDER NUMBER 71-1 Date 19 July 1971

AUTHORITY Police Commissioner

SIGNATURE OF AUTHORITY JOHN L. BARRY

Effective 0001 hrs. 1 August, 1971 Chapter 2 of the Rules & Procedures is amended by the addition of the following section:

2/75.0 Members of the Force and Department shall be neat and clean at all times while on duty. Male personnel shall comply with the following grooming standards unless excluded by the Police Commissioner due to special assignment:

DECISION

First and Fourteenth Amendments. We conclude that summary dismissal based on the pleadings and an affidavit submitted by Deputy Commissioner Eugene Kelley was improper. Accordingly, we reverse and remand for trial.

- 2/75.1 **HAIR:** Hair shall be neat, clean, trimmed, and present a groomed appearance. Hair will not touch the ears or the collar except the closely cut hair on the back of the neck. Hair in front will be groomed so that it does not fall below the band of properly worn headgear. In no case will the bulk or length of the hair interfere with the proper wear of any authorized headgear. The acceptability of a member's hair style will be based upon the criteria in this paragraph and not upon the style in which he chooses to wear his hair.
- 2/75.2 **SIDEBURNS:** If an individual chooses to wear sideburns, they will be neatly trimmed and tapered in the same manner as his haircut. Sideburns will not extend below the lowest part of the exterior ear opening, will be of even width (not flared), and will end with a clean-shaven horizontal line.
- 2/75.3 **MUSTACHES:** A short and neatly trimmed mustache may be worn, but shall not extend over the top of the upper lip or beyond the corners of the mouth.
- 2/75.4 **BEARDS & GOATEES:** The face will be clean-shaven other than the wear of the acceptable mustache or sideburns. Beards and goatees are prohibited, except that a Police Surgeon may grant a waiver for the wearing of a beard for medical reasons with the approval of the Police Commissioner. When a Surgeon prescribes that a member not shave, the beard will be kept trimmed symmetrically and all beard hairs will be kept trimmed so that they do not protrude more than one-half inch from the skin surface of the face.

DECISION

The court correctly recognized that the regulation might well raise constitutional issues of the right to free expression, due process and equal protection if applied to other than uniformed personnel, but analogized the uniformed force to the military and sustained the regulations. A number of courts have upheld such regulations on similar grounds, terming police organizations as para-military or quasi-military requiring strict discipline and uniformity of appearance, see, e.g., *Greenwald v. Frant*, 40 App. Div. 2d 717, 337 N.Y.S. 2d 225 (1972), aff'd without opinion, --- N.Y. --- (May 30, 1973). See also *Stradley v. Anderson*, 349 F. Supp. 1120 (D. Neb. 1972), aff'd --- F. 2d --- (8th Cir., May 17, 1973); *Doyle v. Kammeraad*, 310 Mich. 233, 17 N.W. 2d 165 (1943); *Fraternal Order of Police v. Harris*, 306 Mich. 68, 10 N.W. 2d 310 (1943); *People ex rel. Masterson v. French*, 110 N.Y. 494, 499 (1888).

Central to each of the "para-military" cases is the singular position afforded the military, *Orloff v. Willoughby*, 345 U.S. 83 (1953); see *Hagopian v. Knowlton*, 470 F. 2d 201, 204 (2d Cir. 1972), and the concept that those in the armed forces are deemed to surrender many important rights. "(T)he armed services, their officers,

- 2/75.5 WIGS: Wigs or hair pieces will not be worn on duty in uniform except for cosmetic reasons to cover natural baldness or physical disfiguration. If under these conditions, a wig or hair piece is worn, it will conform to department standards.

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and their manner of discipline do serve an essential function in safe-guarding the country. The need for discipline, with the attendant impairment of certain rights, is an important factor in fully discharging that duty." *Raderman v. Kaine*, 411 F. 2d 1104 (2d Cir.), cert. dismissed, 396 U.S. 976 (1969).

Extension to the uniformed civilian services or the police and fire departments of the unique judicial deference accorded to the military, however, seems to us not warranted. While these services have been characterized as para-military organizations,² see *Doyle v. Kammeraad*, *supra*; *Fraternal Order of Police v. Harris*, *supra*; *Greenwald v. Frank*, *supra*; *People ex rel. Masterson v. French*, *supra*, the characterization is hardly justified either historically or functionally.

The civilian police force is a relatively recent development. It arose out of the need to supplement the private citizen's role in keeping the peace.³ Any "para-militarism" of the force stems not

2 "The government of a police force assimilates to that required in the control of a military body" *People ex rel. Masterson v. French*, *supra*, 110 N.Y. 494, 500 (1888).

3 "The Anglo-Saxon police tradition . . . springs from a configuration of attitudes which were profoundly suspicious of central authority and hostile to the idea of guarding the local peace with militia." Taft & England, *Criminology*, 317, 318 (4th ed. 1964); see also Hall,

DECISION

from its origin nor from the nature of its duty but from the adoption of an organization with a centralized administration and a disciplined rank and file for efficient conduct of its affairs.⁴ The use of such organization evolved as a practical administrative solution and not out of any desire to create a military force.⁵ See R. Fosdick,

Legal and Social Aspects of Arrest Without Warrant, 49 Harv. L. Rev. 566, 579 (1936); Hall, Police and Law in a Democratic Society, 28 Ind. L. Rev. 133, 135-37 (1953).

- 4 Clearly distinct from the continental tradition of a police system which was part of the military establishment under the control of the central state, the Anglo-Saxon police system in England, followed in the United States, developed from a system of local property owners responsible for keeping the peace in their own towns or villages. Statute of Winchester, 13 Edw. 1, §2 (1285). See 49 Harv. L. Rev. 580-83; 28 Ind. L. Rev. at 135. Creation of a separate police force in London in 1829 was accomplished only after fear of an armed militia to be used against the liberty of citizens was overcome. See 49 Harv. L. Rev., supra, n. 3 at 587-90. W. Lee, A History of Police in England at 248. New York, the first to follow the English example, replaced its separately organized systems of night and day watchmen which were comprised generally of otherwise employed men, with a force of 800 men under a police chief. The force was un-uniformed, undisciplined and essentially political. Members were appointed for one year by local aldermen. The history of the force throughout the nineteenth century makes clear that there was no intention to create a civilian military. See R. Fosdick, American Police Systems at 109-10 (1920). The discipline as it exists today was a late development in the force.
- 5 Police are given the powers of a constable. N. Y. Village Law §8-802 (McKinney) used under reference from N. Y. Unconsol. Laws §5732; Suffolk Constitution art. XII § 1208. See N. Y. Town Law §39.

DECISION

American Police Systems ch. 2 (1920); W. Lee, A History of Police in England (1901) (1971 ed.). The police force remains significantly different in character from the military. It is still locally controlled and organized, see N.Y. Unconsol. Laws §5721, and subject to more direct control of the electorate, N.Y. Unconsol. Laws §5722, Suffolk County Constitution art. XII §1202 (a), (b) (4), (b) (5) and §1211. Appointment of members of the force is made under Civil Service Regulation. While police officials are given broad discretion in running a department, dismissal of patrolmen is subject to court review. N.Y. Village Law §8-806 (McKinney N.Y. Unconsol. Laws §5732); see *People ex rel. Hart v. Board of Fire Commissioners*, 82 N.Y. 358, 360-61 (1880).

Discipline although essential to an effective police force as it is to the military is clearly of a different type.⁶ Instant unquestioning obedience has been found essential to a soldier in action and his training and its attendant discipline is designed to develop such obedience. The same type of instant unquestioning obedience is not necessary for an effective police force. See *Greenwald v. Frank*, *supra* at 94. Rather it has been suggested that the military model of organization and discipline must not be followed too closely as

⁶ At issue in *Masterson*, see n. 2, and similar New York cases was the propriety of the dismissal of the patrolmen from the force for such malfeasance as negligent homicide or appearing on duty while intoxicated. There is little similarity between the disciplinary questions in these cases and Order No. 71-1 which the district court apparently found designed to inculcate discipline.

DECISION

a policeman unlike a soldier frequently acts individually on his own initiative and not subject to the immediate supervision of his superiors. See W. Lee, *A History of Police in England* at 401-402.

This is not to say, however, that the special nature of the police officer's duties and the recognized need to maintain a singular degree of discipline are immaterial. These factors are relevant to the determination of the validity of the General Order bearing not on the nature of plaintiff's rights, but on the existence of a legitimate state interest to be reasonably advanced by the regulation.⁷ A policeman does not, however, waive his right to be free from arbitrary and unjustifiable infringement of his personal liberty when he elects to join the force.⁸ See *Garrity v. New Jersey*, 385 U.S.

⁷ See, e.g., *Linguist v. City of Coral Gables*, 323 F. Supp. 1161 (S.D. Fla. 1971).

⁸ However, with the exception of *Hunt v. Board of Fire Commissioners of Massapequa Fire District*, 68 Misc. 2d 261, 327 N.Y.S. 2d 36 (1971), the New York courts have sustained the validity of grooming regulations for firemen and policemen. See *Olsewski v. Council of Hempstead Fire Department*, 70 Misc. 603, 334 N.Y.S. 2d 504, 506 (Sup. Ct. 1972) (based on a showing of safety needs); *Austin v. Howard*, 39 App. Div. 2d 76, 332 N.Y.S. 2d 434 (1972) (upheld suspension of fireman for failure to wear proper boots). The Court of Appeals affirmed without opinion an order upholding the regulations at issue here, in a case brought by a Nassau County policeman. *Greenwald v. Frank*, --- N.Y. --- (May 30, 1973). The New York Supreme Court had recognized that a policeman has a constitutional interest in determining his own appearance but found that interest outweighed by the "powerful countervailing interest" of the police

DECISION

493, 499-500 (1967); *Muller v. Conlisk*, 429 F. 2d 901, 904 (7th Cir. 1970).

While it has been argued that hair length controversies are much ado about nothing, we think there is a substantial constitutional issue raised by regulation of the plaintiff's hair length. The question is whether the government may interfere with the physical integrity of the individual and require compliance with its standard of personal appearance without demonstrating some legitimate state interest reasonably requiring such restriction on the individual. The first, third, fourth, seventh and eighth circuits have held that the Constitution limits the state's right to regulate the personal appearance of its citizens.⁹ We agree.

department and the general public. 70 Misc. 2d 632, 639, 334 N.Y.S. 2d 680, 688 (Sup. Ct. 1972). The Appellate Division while affirming the order held that the appeal failed to raise substantial constitutional issues. Its affirmance was based on a finding that "there should be neatness and discipline in a large quasi-military organization such as the Nassau County Police Department..." 40 App. Div. 2d 717, 337 N.Y.S. 2d at 225.

- ⁹ Several district courts in this circuit have so ruled. In *Seale v. Manson*, 326 F. Supp. 1375 (D. Conn. 1971) the court held that a prisoner's choice of hair length and facial hair is a personal liberty protected by due process and that without evidence supporting the prison's rationale for prohibiting beards and goatees a prisoner could not be forced to shave. A school's regulation of hair style was held to be violative of a substantial right of the student.

DECISION

See *Ollf v. East Side Union High School District*, 404 U.S. 1042 (Douglas, J., dissenting from denial of certiorari).

An increasing number of courts have recognized the right of the individual to style his own appearance, but there has been little consensus on the source of constitutional protection. The right has been found in the First Amendment, *Arnold v. Carpenter*, 459 F. 2d 939 (7th Cir. 1972); the Ninth Amendment, *Bishop v. Colaw*, 450 F. 2d 1069 (8th Cir. 1971); the Equal Protection Clause of the Fourteenth Amendment, *Massie v. Henry*, 455 F. 2d 779 (4th Cir. 1972), and the due process guarantees of the Fifth and Fourteenth Amendments, *Stull v. School Board of the Western Beaver Junior-Senior High School*, 459 F. 2d 339 (3rd Cir. 1972); *Richards v. Thurston*, 424 F. 2d 1281 (1st Cir. 1970); *Massie v. Henry*, *supra*.

where no compelling state interest was shown for the regulation. See *Durham v. Pulcifer*, 312 F. Supp. 411 (D. Vt. 1970); but see *Crossen v. Fatsi*, 309 F. Supp. 114, 118 (D. Conn. 1970). A military prohibition on the wearing of short-haired wigs, admittedly neat and conforming to Army appearance requirements and not interfering with the proper execution of a reservist's duty was held an abuse of discretion and an unjustifiable interference with the right of the reservist to wear long hair in off-duty hours. *Harris v. Kaine*, 352 F. Supp. 769 (S.D.N.Y. 1972). While these cases and many of those in the other circuits have not concerned uniformed police and fire departments, the basic issue remains the same--the right of the state to impose standards of hair styling. The different status of the individual raising the claim bears on the question of whether the right is outweighed by a legitimate state interest.

DECISION

We may well base the right on the guarantee under the Due Process Clause of personal liberty of "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints...." *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). Cf. *Roe v. Wade*, --- U.S. ---, 93 S. Ct. 705, 726 (1973); *Rochin v. California*, 342 U.S. 165 (1952). Personal liberty is not composed simply and only of freedoms held to be fundamental but includes the freedom to make and act on less significant personal decisions without arbitrary government interference. Limitation of such a right requires some showing of public need.

We hold only that choice of personal appearance is an ingredient of an individual's personal liberty, and that any restriction on that right must be justified by a legitimate state interest reasonably related to the regulation. Here the department has failed to make the slightest showing of the relationship between its regulation and the legitimate interest it sought to promote. The sole presentation by the department was the affidavit submitted by Deputy Commissioner Kelley. That affidavit commented only that the regulation was directed at both uniformed and non-uniformed officers, it was silent on the question of the necessity for the regulation in maintaining discipline. In the absence of the requisite justification by the department, dismissal of the complaint under Rule 12 (b) (6)

DECISION

was in error. Nor would summary judgment on the affidavit submitted be justified since a genuine issue was presented for trial. We imply no views on the merits. We indicate simply that, at trial, the Commissioner has the burden of establishing a genuine public need for the regulation.

Reversed and remanded.

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THOMAS DWEN, as President of the Suffolk
County Patrolman's Benevolent Association
and THOMAS DWEN, Individually,

Plaintiff,

-against-

JOHN L. BARRY, Commissioner of the
Suffolk County Police Department,

Defendant.

NOTICE IS HEREBY GIVEN that THOMAS DWEN,
as President of the Suffolk County Patrolman's
Benevolent Association, and THOMAS DWEN, Individually,
Plaintiff above named, appeals to the Court of Appeals
for the Second Circuit from a Memorandum of Decision
and Order of the HON. JACOB MISHLER dated November 8,
1971, said Order denying Plaintiff's request for a
preliminary injunction, as well as a Memorandum of
Decision and Order of the HON. JACOB MISHLER dated

NOTICE OF APPEAL

November 30, 1971 dismissing the Complaint herein.

Dated: December 6, 1971

MEYER & WEXLER, ESQS.
Attorneys for the Appellant

BY s/ Richard T. Haefeli
RICHARD T. HAEFELI
28 Manor Road
Smithtown, New York 11787
(516) 265-4500

TO: The Hon. GEORGE W. PERCY, JR.
Attorney for the Defendant
County Attorney, Suffolk County
County Center
Riverhead, New York 11901

MEMORANDUM OF DECISION AND ORDER
DATED NOVEMBER 30, 1971

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

For the reasons expressed in the memorandum of decision dated November 3, 1971 the complaint is dismissed.

The Clerk is directed to enter judgment in favor of the defendant and against the plaintiff dismissing the complaint, and it is

SO ORDERED.

JACOB MISHLER
U. S. D. J.

AFFIDAVIT OF EUGENE R. KELLEY
SWORN TO NOVEMBER 16, 1971

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
 :
COUNTY OF SUFFOLK)

EUGENE R. KELLEY, being duly sworn,
deposes and says:

1. That he is the duly appointed Deputy Commissioner of the Suffolk County Police Department and submits this affidavit in behalf of the Police Commissioner of Suffolk County (the defendant herein), who is out of the County and unavailable.

2. That he has read the decision of the Hon. Jacob Mischler, United States District Judge dated November 8, 1971 concerning this case and has been informed of the contents of the brief submitted on behalf of plaintiffs herein.

3. For the information of the Court, your deponent has set out in the following paragraphs the rationale of the Police Commissioner's General Order #71-1 (Grooming Standards) as it relates to Plainclothesmen and Detectives.

AFFIDAVIT OF EUGENE R. KELLEY
SWORN TO NOVEMBER 16, 1971

4. The permanent civil service rank of every sworn member of this department who serves as a plainclothesman or detective, is that of a Patrolman in the Suffolk County Police Department.

5. Detectives are assigned to such positions solely at the discretion of the Police Commissioner and can be returned to uniformed duty at any time. They serve in the Detective Division and they number about 450.

6. Plainclothesmen are patrolmen who have been designated to perform certain duties in civilian clothes. They serve in the Patrol Force, the same division to which all uniformed personnel are assigned. They are designated plainclothesmen by the Precinct Commanders with the approval of the Police Commissioner. They are presently 52 plainclothesmen in this department.

7. Every detective and every plainclothesman in this department has been, and is presently, subject to the same set of rules, both as to discipline and grooming. We live in a volatile society where trouble can erupt in any setting. Schools, labor establishments and prisons have all been settings for disorder. This department has

AFFIDAVIT OF EUGENE R. KELLEY
SWORN TO NOVEMBER 16, 1971

mobilization procedures which range from assembling a few patrolmen to full mobilization of the entire department, (i.e. - Everyone reports to his station "in uniform" for the emergency, detectives included). This department has fully mobilized for the Stony Brook University riot in May 1969, and Carleton Park disorders in the summer of 1970. Such disorders can occur at any time.

8. Detectives and plainclothesmen have been ordered into uniform on many occasions in the past for such things as industrial disputes, National Security details, riot control, assignments involving V.I.Ps., Parade, Funeral and Escort details. Frequently, time is so short, there is no time to get to the Barber Shop and hence my belief, detectives and plainclothesmen should fall under the same grooming standards as the uniformed force.

9. In addition, detectives and plainclothesmen frequently are on the lecture circuit, speaking at schools, luncheons, etc. Since they appear as members of this department and, in fact, represent the department itself, they should be subject to the same regulations as the uniformed force.

AFFIDAVIT OF EUGENE R. KELLEY
SWORN TO NOVEMBER 16, 1971

10. The Rules and Procedures of this department require every detective and plainclothesman to maintain a full set of uniforms ready for instant use, and provide for uniform inspection twice a year.

11. The President Judge of the Suffolk County District Court has recently requested your deponent to have all policemen to testify in that court appear neatly dressed and groomed despite the fact they may be detectives, etc. This for the reason that juries apparently find neatly dressed and neatly groomed policemen more credible than those who are not so neatly dressed or groomed.

12. This Court is also asked to consider the possible damage to morale of this department were it to attempt to administer and apply a "double standard" as to grooming of members of the force, one for the uniformed division and one for the detective division. The Court, by its decision dated November 8, 1971, has apparently ruled that General Order 71-1 violates no Constitutional principles as it relates to uniformed policemen. Thus, the overwhelming majority of this department falls within the ambit of the Court's decision.

AFFIDAVIT OF EUGENE R. KELLEY
SWORN TO NOVEMBER 16, 1971

This Court is asked not to make an exception for detectives and plainclothesmen who comprise only about 20% of the total force, but whose members presently enjoy almost 100% of those exemptions already granted by the Commissioner to the provisions of General Order #71-1.

13. Finally, this Court is assured that exemptions will be (and have been) made to General Order 71-1 to fit the exigencies and demands of this department and for surgical, medical or cosmetic reasons involving individual members of the force.

s/ Eugene R. Kelley
EUGENE R. KELLEY
Deputy Commissioner

[Duly Sworn to
November 16, 1971]

MEMORANDUM OF DECISION AND
ORDER DATED NOVEMBER 8, 1971

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiff, a patrolman employed by the Suffolk County Police Department and president of Suffolk County Patrolmen's Benevolent Association, seeks a preliminary injunction enjoining enforcement of general order number 71-1, which order amends Chapter 2 of the Rules and Procedures of the Suffolk County Police Department, which became effective August 1, 1971. The order sets grooming standards for members of the Suffolk County Police Department.^{/1} Under the order, beards and goatees are forbidden; sideburns may "not extend below the lowest part of the exterior ear opening"; and mustaches must be short and neatly trimmed. The affidavit in support of the application states that community standards are less restrictive and that compliance with the order will, in effect, set him apart from the community in violation of his constitutional rights. The claim sets forth First and Fourteenth Amendment

^{/1} Order set out in appendix

MEMORANDUM OF DECISION AND
ORDER DATED NOVEMBER 8, 1971

violations in that the order deprives plaintiff of his right of free expression, due process and equal protection of law.

Univormity of dress is part of the discipline of the local police department. It is the visible sign of the presence of the law. How the police officer appears to the public is one factor in effective law enforcement. Regulations involving dress and grooming are better left to the officials who are aware of the local customs and taboos. It would be inappropriate for the court to frame such regulations, absent a clear showing of a violation of a constitutional right.

Circuit (now Chief) Judge Friendly in Negron v. Wallace, 436 F.2d 1139, 1141 (2d Cir. 1971), discussing a claim brought in the federal court under 42 U.S.C. §1983, said, "Suits under that statute should not be lightly brought." He suggested that such claims be resolved "...by calm discussions with the state officials in the absence of any litigation whatsoever."

Turning to the merits of the application, authority for defendant's position is found in

MEMORANDUM OF DECISION AND
ORDER DATED NOVEMBER 8, 1971

decisions reviewing army regulations concerning grooming. Doyle v. Koelbe, 434 F.2d 1014 (5th Cir. 1970). Plaintiff would distinguish those cases from the instant case on the ground that the New York Criminal Procedure Law includes in the definition of police officer certain members of the New York City Fire Department and investigators on the staff of county district attorneys.

The intent of the regulation is that it apply to uniformed police officers. This is evident from the list of exemptions submitted to the court by defendant as of August 18, 1971.^{/2} Application of the regulation to members not in uniform might

/2 Those exempted to August 18, 1971:

- 4 Detectives - Intelligence Squad, Undercover assignment, must frequently associate with persons and in circles where extreme hair styling is prevelant.
- 48 Detectives - Narcotics Squad.
Undercover assignment as above.
- 4 Detectives - Special Investigations Squad.
(Gambling, Vice, etc.)
Undercover assignment as above.
- 1 Detective - Robbery Squad.
Special assignment to
infiltrate members of gang.

MEMORANDUM OF DECISION AND
ORDER DATED NOVEMBER 8, 1971

very well bring the regulation within the prohibitions of the Constitution. See Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678 (1965).

Nor is the attempt by the plaintiff to distinguish police from the military for the purposes of the regulation persuasive. The courts have held that members of the armed forces do not have their full constitutional rights while serving in the service. Raderman v. Kaine, 411 F.2d 1102 (2d Cir. 1969). In Raderman, the court indicated that it did not intervene in the matter involving a directive revoking one permitting long hair because "...there is clearly no action by the military which goes far beyond any rational exercise of discretion."

The plaintiff further distinguishes the duties of the police from that of the military in pointing out that the police officer has duty and non-duty hours. The court, assuming this questioned state, would nevertheless find a closer fact pattern in the case of a member of the National Guard.

In Gianatasio v. Whyte, 426 F.2d 908 (2d Cir. 1970), the plaintiff enlisted in the National Guard. Plaintiff was the manager of a shoe bazaar in

MEMORANDUM OF DECISION AND
ORDER DATED NOVEMBER 8, 1971

Westport, Connecticut and claimed that his long hair helped him in his job and that it was essential to his civilian work. Because of his refusal to cut his hair as required by Army regulations, he was ordered to report for active duty. The court dismissed the attack on the validity of the regulation with the observation that the military has wide discretion in regulating hair length. Gianatasio v. Whyte, supra, at p. 911.

Motion for a preliminary injunction is denied, and it is

SO ORDERED.

The court believes the claim is insufficient as a matter of law. It is however reluctant to dismiss the complaint without affording plaintiff an opportunity to argue the point. The court sets the matter down for argument on November 19th, 1971 at 10:00 A.M. All briefs to be submitted by November 15th, 1971.

JACOB MISHLER
U. S. D. J.

ORDER NUMBER 71-1 AMENDING
RULES AND PROCEDURES

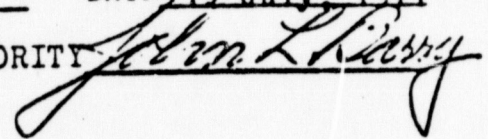
POLICE DEPARTMENT, COUNTY OF SUFFOLK, N.Y.

☒ GENERAL
☐ SPECIAL
☐ PERSONNEL

ORDER NUMBER 71 - 1

DATE 19 July, 1971

AUTHORITY Police Commissioner SIGNATURE OF AUTHORITY



Effective 0001 hrs. 1 August, 1971 Chapter 2 of the Rules & Procedures is amended by the addition of the following section:

- 2/75.0 Members of the Force and Department shall be neat and clean at all times while on duty. Male personnel shall comply with the following grooming standards unless excluded by the Police Commissioner due to special assignment:
- 2/75.1 HAIR: Hair shall be neat, clean, trimmed, and present a groomed appearance. Hair will not touch the ears or the collar except the closely cut hair on the back of the neck. Hair in front will be groomed so that it does not fall below the band of properly worn headgear. In no case will the bulk or length of the hair interfere with the proper wear of any authorized headgear. The acceptability of a member's hair style will be based upon the criteria in this paragraph and not upon the style in which he chooses to wear his hair.
- 2/75.2 SIDEBURNS: If an individual chooses to wear sideburns, they will be neatly trimmed and tapered in the same manner as his haircut. Sideburns will not extend below the lowest part of the exterior ear opening, will be of even width (not flared), and will end with a clean-shaven horizontal line.
- 2/75.3 MUSTACHES: A short and neatly trimmed mustache may be worn, but shall not extend over the top of the upper lip or beyond the corners of the mouth.
- 2/75.4 BEARDS & GOATEES: The face will be clean-shaven other than the wear of the acceptable mustache or sideburns. Beards and goatees are prohibited, except that a Police Surgeon may grant a waiver for the wearing of a beard for medical reasons with the approval of the Police Commissioner. When a Surgeon prescribes that a member not shave, the beard will be kept trimmed symmetrically and all beard hairs will be kept trimmed so that they do not protrude more than one-half inch from the skin surface of the face.

ORDER NUMBER 71-1 AMENDING
RULES AND PROCEDURES

GENERAL ORDER 71- 1 (Continued)

2/75.5 WIGS: Wigs or hair pieces will not be worn on duty in uniform except for cosmetic reasons to cover natural baldness or physical disfiguration. If under these conditions, a wig or hair piece is worn, it will conform to department standards.

ANSWER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendant answering the complaint herein
by GEORGE W. PERCY, JR., County Attorney of Suffolk
County, respectfully alleges:

FIRST: Denies the allegations contained
in paragraphs of the complaint numbered 1, 5 and 6.

WHEREFORE, defendant respectfully requests
that the complaint be dismissed together with such
other and further relief as to the court may seem
just and proper.

s/ George W. Percy, Jr.
GEORGE W. PERCY, JR.
County Attorney, Suffolk County
Attorney for Defendant
Suffolk County Center
Riverhead, New York 11901
(516) 727-4700

SUMMONS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned and required to serve upon LEONARD D. WEXLER, ESQ., plaintiff's attorney, whose address is 28 Manor Road, Smithtown, New York, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

s/ Lewis Orbel
Clerk of the Court

By s/ James R. Abram
Deputy Clerk

Dated: Aug 4, 1971

COMPLAINT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

I. Jurisdiction.

1. The jurisdiction of this Court is founded upon the existence of a federal question.

This action arises under the First and Fourteenth Amendments to the Constitution of the United States. This is an action for a declaratory judgment and a permanent injunction to prevent the further deprivation of the plaintiff's constitutional rights of free expression, due process and equal protection as provided for in the First and Fourteenth Amendments to the Constitution of the United States.

II. Parties

2. The plaintiff, THOMAS DWEN is President of the Suffolk County Patrolmen's Benevolent Association as well as an individual patrolman of the Suffolk County Police Department who resides in the County of Suffolk, State of New York.

3. The defendant, JOHN L. BARRY is the Commissioner of the Suffolk County Police Department,

COMPLAINT

a State agency charged with the responsibility of maintaining public peace and welfare and JOHN L. BARRY is an employee and Chief Administrator of said police department.

III. Incidents at Issue.

4. On July 19, 1971, the defendant, JOHN L. BARRY in his capacity as Commissioner of the Suffolk County Police Department issued general order number 71-1 of the Suffolk County Police Department; said order amending Chapter 2 of the Rules & Procedures of the Suffolk County Police Department and became effective as of 12:00 midnight on August 1, 1971.

That said general order amended the aforementioned rules and regulations regarding the length of hair and sideburns, as the wearing of beards and mustaches by members of the Suffolk County Police Department. (Annexed hereto and made a part hereof and marked Exhibit A is a true and exact copy of said general order.)

IV. Cause of Action.

5. That the aforementioned amendment of the Rules & Procedures regarding the personal

COMPLAINT

grooming of individual patrolmen is in violation of the plaintiff's constitutional rights of free expression, due process and equal protection as provided for in the First and Fourteenth Amendments to the Constitution of the United States, in that said rules and regulations are not based upon the generally accepted standard of grooming in the community and that it places an undue restriction upon the plaintiff in his activities in the community.

6. Plaintiff is now suffering and will continue to suffer irreparable injury as a result of the aforementioned restriction imposed by the defendant. Plaintiff has no plain, adequate or complete remedy at law to redress these violations of his constitutional rights, and this suit for permanent injunction and declaratory judgment is his only means of securing complete and adequate relief.

WHEREFORE, plaintiff prays that this Court:

(a) Declare that the aforementioned amendment of the rules and regulations are illegal and in violation of the plaintiff's constitutional rights.

(b) Declare that the plaintiff be permitted to adapt a mode of personal grooming which conforms

COMPLAINT

to the generally accepted standard of the community.

(c) Grant the plaintiff a permanent injunction, ordering the defendant, his agents, servants and/or employees and all persons in active concert with him from enforcing Chapter 2 of the Rules & Procedures of the Suffolk County Police Department as amended by general order number 71-1 of the Suffolk County Police Department.

(d) Grant the plaintiff nominal compensatory and punitive damages in the amount of ONE (\$1.00) DOLLAR.

(e) Grant such other and further relief as to this Court seems just and proper.

Respectfully submitted,

LEONARD D. WEXLER
Attorney for Plaintiff
Office & P. O. Address
28 Manor Road
Smithtown, New York
(516) 265-4500

ORDER TO SHOW CAUSE
DATED AUGUST 4, 1971

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Upon reading and filing the summons and complaint and the annexed affidavits of THOMAS DWEN, duly sworn to the 3rd day of August, 1971, and LEONARD D. WEXLER, ESQ., duly sworn to on the 3rd day of August, 1971, and the exhibits attached hereto, it is

ORDERED, that JOHN L. BARRY, Commissioner of the Suffolk County Police Department show cause at a Motion Term part of this Court to be held in Court Room #5, United States Court House, 225 Cadmen Plaza East, Brooklyn, New York, on the 10th day of August, 1971, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard why an order should not be made pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining JOHN L. BARRY, Commissioner of the Suffolk County Police Department, from enforcing General Order #71-1 of the Suffolk County Police Department dated the 19th day of July, 1971, said order amending Chapter 2 of the Rules and Procedures of the Suffolk

ORDER TO SHOW CAUSE
DATED AUGUST 4, 1971

County Police Department, and it is further

ORDERED, that service of a copy of this Order, the papers upon which it is based and the summons and complaint shall be made personally upon said JOHN L. BARRY, Commissioner of the Suffolk County Police Department on or before the 5th day of August, 1971, at or before 2:00 P.M. o'clock and that said service shall be deemed sufficient.

s/Jacob Mishler
United States District Judge

Service by RICHARD T. HAEFELI a person over the age of 21 years old not a party to the litigation is authorized to serve process.

s/Jacob Mishler
U.S.D.J.

**AFFIDAVIT OF THOMAS DWEN
DATED AUGUST 3, 1971**

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

[SAME TITLE]

STATE OF NEW YORK)
COUNTY OF SUFFOLK) ss.:

THOMAS DWEN, being duly sworn, deposes
and says:

That you deponent is the plaintiff in the above entitled action, and as such is fully familiar with all of the facts and circumstances as herein-after set forth.

That your deponent, as President of the Suffolk County Patrolmen's Benevolent Association as well as an individual patrolman of the Suffolk County Police Department, submits this affidavit in support of the within application requesting an Order enjoining JOHN L. BARRY, Commissioner of the Suffolk County Police Department from enforcing Chapter 2 of the Rules and Procedures of the Suffolk County Police Department as amended by General Order #71-1 of the Suffolk County Police Department.

(Annexed hereto, made a part hereof and marked

AFFIDAVIT OF THOMAS DWEN
DATED AUGUST 3, 1971

Exhibit "A" is a true and exact copy of said General Order.)

That the Police Commissioner's attempt to regulate length of hair and sideburns as well as the wearing of mustaches beards is an infringement upon your deponent's constitutional rights of free expression, due process and equal protection as provided for in the First and Fourteenth Amendments to the United States Constitution.

That you deponent respectfully submits to this Court that for any Police Department's Rules and Procedures regarding personal grooming to be valid, they must be based upon the generally accepted standard of grooming in the community in which said Police Department is located.

That in the instant case, the amended Rules and Procedures are not based upon such a standard, rather they are based upon the personal standard of the Police Commissioner.

That you deponent, as a member of the community, knows of his own knowledge that the amended Rules and Procedures are more restrictive than the generally accepted standard of the community.

AFFIDAVIT OF THOMAS DWEN
DATED AUGUST 3, 1971

That enforcement of the amended Rules and Procedures will prevent your deponent from establishing his identity in the community separate and apart from his identity as a patrolman, and that such a consequence would violate your deponent's constitutional rights.

Further, your deponent respectfully points out to this Court that enforcement of the amended Rules and Procedures based upon the personal standard of the Police Commissioner and not the generally accepted standard of the community will be in violation of your deponent's constitutional rights.

That your deponent, simultaneously with this motion, is instituting a civil action against the defendant for a declaratory judgment and permanent injunction. (Annexed hereto, made a part hereof and marked Exhibit "B" is a true and exact copy of said summons and complaint.)

WHEREFORE, your deponent respectfully requests that the within application be, in all respects, granted.

s/Thomas Dwen
THOMAS DWEN

[Duly sworn to
August 3, 1971].

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

STATE OF NEW YORK)
COUNTY OF SUFFOLK) ss.:

That you deponent is the attorney for the plaintiff herein and as such is fully familiar with all of the facts and circumstances as hereinafter set forth.

That your deponent respectfully submits to this Court that the granting of a restraining order pending a hearing for a preliminary injunction will in no way injure the defendant herein.

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AFFIDAVIT OF LEONARD D. WEXLER
DATED AUGUST 3, 1971

at law and in view of fact that the plaintiff is presently suffering irreparable injury as a result of the defendant's actions time is of the essence.

That no prior application for the relief sought herein has been requested in this of any other Court.

WHEREFORE, your deponent respectfully requests that the within application be, in all respects, granted.

s/Leonard D. Wexler
LEONARD D. WEXLER

[Duly sworn to
August 3, 1971]

